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IN THE

Supreme Court of the United States

October Term, 1971

Case Number 71 - 208

GEORGE E. DUDLEY, Receiver For Insurance Investors Trust Company,

Plaintiff-Respondent,

-vs-

SOUTHEASTERN FACTOR AND FINANCE CORPORATION, JAMES M. McDANIEL, ERNESTINE H. McDANIEL, et al.,

Defendants-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1971

Case Number _____

GEORGE E. DUDLEY, Receiver For Insurance Investors Trust Company,

Plaintiff-Respondent,

-vs-

SOUTHEASTERN FACTOR AND FINANCE CORPORATION, JAMES M. McDANIEL, ERNESTINE H. McDANIEL, et al.,

Defendants-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES M. McDANIEL and ERNESTINE H. McDANIEL, Defendants-Petitioners, Petition this Court for Writ Of Certiorari to review the judgment and opinion of the United States Court of Appeals For The Fifth Circuit entered in the case of GEORGE E. DUDLEY, Receiver For Insurance Investors Trust Company V. SOUTHEASTERN FACTOR AND FINANCE CORPORATION, JAMES M. McDANIEL, ERNESTINE H. McDANIEL, et al., on July 9, 1971.

OPINION BELOW

The opinion and judgment of the United States Court of Appeals For The Fifth Circuit is as yet unreported but is appended hereto, (Appendix) the opinion and judgment being dated July 9, 1971.

JURISDICTION

The opinion and judgment of the United States Court of Appeals For The Fifth Circuit was entered and dated July 9, 1971. The jurisdiction of this Court is invoked as provided under the provisions of 28 U.S.C.A. Section 1254.

QUESTION PRESENTED

The question presented is whether the United States Court of Appeals For The Fifth Circuit properly reversed and remanded the opinion and judgment of the United States District Court For The Northern District of Georgia, Atlanta Division, wherein Motion To Dismiss in behalf of JAMES M. McDANIEL and ERNESTINE H. McDANIEL was sustained and granted, the District Court holding that the Complaint filed in behalf of GEORGE E. DUDLEY, Receiver for Insurance Investors Trust Company, Plaintiff-Respondent, did not set forth therein a federal claim under the Securities Act of 1933 or the Securities Exchange Act of 1934 or an independent ground of federal Court jurisdiction with regard to the common law.

STATUTES INVOLVED

(1) Section 17, Securities Act of 1933, 15 U.S.C. Section 77q (1964)

(2) Section 3, Securities Exchange Act of 1934, 15 U.S.C. Section 78c (1964)

(3) Section 10, Securities Exchange Act of 1934, 15 U.S.C. Section 78j (1964)

(4) SEC Rule 10b-5, 17 C.F.R. Section 240.10b-5 (1968)

(5) 28 U.S.C. Section 1653 (1964)

(6) Federal Rules of Civil Procedure (9b)

The two Texts which frame the answer by the United States Court of Appeals For The Fifth Circuit to the query whether the Complaint allegations were enough to invoke federal jurisdiction under the securities legislation provide:

Section 10(b) of the Securities Exchange Act of 1934:

> "It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .
>
> * * * * * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. Section 78j(b) (1964)

Rule 10b-5 of the Securities and Exchange Commission:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) to employ any device, scheme or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security." 17 C.F.R. Section 240.10b-5 (1971)

Federal Rules of Civil Procedure 9(b)

"Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

STATEMENT OF CASE

Civil Action Complaint was brought by GEORGE E. DUDLEY, Receiver for Insurance Investors Trust Company (hereinafter referred to as IITC), Plaintiff-Respondent, to recover damages allegedly sustained by IITC as a result of Defendant's-Petitioner's allegedly wrongfully withholding from IITC (a shareholder of Defendant Southeastern Factor and Finance Corporation) its proportionate share of a liquidating distribution from Southeastern. Jurisdiction is alleged under the Securities Act of 1933 (15 U.S.C. Section 77a, et seq.), 28 U.S.C. Section 1337, and 28 U.S.C. Section 1332. The complaint alleges that in July, 1966 IITC and Southeastern entered into a written contract pursuant to which IITC

conveyed to Southeastern approximately 621,000 shares of the common stock of another corporation (Acme, Inc.) in exchange for approximately 168,000 shares of the preferred stock of Southeastern. IITC subsequently transferred some of its Southeastern stock to First American Life Insurance Company of Alabama, which company thereafter was also a preferred shareholder of Southeastern. During the summer of 1967, Defendant Atlantic Services, Inc., and Defendant Southeastern entered into an agreement pursuant to which Southeastern was to sell to Atlantic certain shares, and options to purchase additional shares of preferred stock in First American Life Insurance Company of Alabama, and Atlantic was to issue to Southeastern 34,000 shares of Atlantic's convertible preferred stock. This latter transaction allegedly was pursuant to a plan of liquidation adopted by Southeastern whereby all creditors and shareholders were to receive assets of Southeastern. Defendant Atlantic allegedly distributed the shares which it had agreed to transfer to Southeastern directly to the creditors and common shareholders of Southeastern, pursuant to Southeastern's instructions, but in so doing ignored the preferred position of IITC and First American (of which latter corporation Atlantic was itself a preferred shareholder). IITC claims that the transaction between Atlantic and Southeastern was intended to, and did, result in a fraud upon certain shareholders of Southeastern in that they were not given their liquidating shares as required by Southeastern's liquidation plan, the allegation of fraud not being made with particularity. (Appendix A)

Defendants Ernestine and James M. McDaniel and Defendants Maurice E. Olen, C. A. Scheuerman, and Crown Services Corporation moved to dismiss on grounds

of (1) failure to state a claim, (2) improper venue, (3) failure to state a claim under the Securities Acts and improperly joining with the claim arising under the Securities Acts a claim based on common law grounds of misfeasance, malfeasance, fraud, and unjust enrichment, and (4) failure to show on the face of the complaint that the action was brought within the period of the statute of limitations. In addition, the Olen defendants moved to dismiss for insufficiency of process and lack of personal jurisdiction. (Appendix A)

The District Court held that the Complaint did not state a claim under the Securities Act of 1933 or the Securities Exchange Act of 1934, the federal claims being dismissed, and that since it did not appear from the Complaint that an independent ground of federal court jurisdiction existed with regard to the common law claim, the state claim was dismissed without prejudice to its being refiled if an independent ground of federal court jurisdiction could be demonstrated. (Appendix A)

GEORGE E. DUDLEY, Receiver for Insurance Investors Trust Company, Plaintiff-Respondent appealed the aforesaid District Court decision to the United States Court of Appeals For The Fifth Circuit, that court reversing and remanding, which is the subject of this Petition For Writ Of Certiorari. (Appendix B)

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT

Through broad and liberal interpretation by the Courts the intended federal coverage by the Securities Acts and Rules thereunder has been stretched completely out of line with the intention of Congress when

said statutes were enacted. (See footnotes 2 and 6 of Decision.)

ARGUMENT AND CITATIONS OF AUTHORITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

It is respectfully submitted and strongly urged that the Complaint does not set forth a claim arising under the Securities Acts. Those statutes give rise to causes of action arising out of fraudulent or deceptive acts connected with the sale or purchase of securities. The United States Court of Appeals For The Fifth Circuit recognized in *Hooper v. Mountain States Securities Corp.*, 282 Fed. 2nd 195 (1960) that a significant purpose of Section 10(h) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78j(b)) and the regulations authorized therein (SEC Regulation X-10B-5) was to extend to sellers of securities the same protection against fraudulent and other unlawful schemes which the Securities Act of 1933 afforded to those defrauded in the purchase of securities. Any injury Plaintiff-Respondent received as a result of the acts set forth in the Complaint did not result from the sale or purchase of securities, but, rather, resulted from the purchaser Corporation's failure properly to distribute among its shareholders certain securities which the Corporation itself had purchased. Stripped of adornment, the Complaint alleges a complaint against Defendants-Petitioners for failure in a duty to see to it that IITC received its proportionate share of a distribution in connection with a partial liquidation by Southeastern. Neither of the Securities Acts referred to covers the situation, and no jurisdiction existed based upon a federal claim. In the Complaint, all that is said is that "the distribution of

shares of Atlantic to common stockholders of Southeastern was in fraud of this creditor," creditor meaning IITC. It is respectfully submitted that under the Securities Act of 1933, the fraud contemplated is something more than a mere failure to give a stockholder its claimed share of a dividend. In the Complaint no claim is made that the contract between Atlantic and Southeastern was fraudulent, and thus no attack has been made on the only "purchase" or "sale" which is involved in the allegations in the case. There must be a "sale" or "offer of sale" which is being attacked in order for jurisdiction to attach under the federal statutes. *Holmberg v. Williamson*, 135 F. Supp. 493 (D.C. N.Y., 1955). The leading case of *Birnbaum v. Newport Steel Corporation*, 193 F.2nd 461 (C.A. 2), cert. denied, 343 U.S. 956, 72 S.Ct. 1051, 96 L.Ed. 1356 (1952), interpreted the phrase "in connection with the purchase or sale of any security" in both statute and rule as limiting permissible Plaintiffs in a civil action under the rule to "purchasers" or "sellers" of securities. See *Rekant v. Desser*, 425 F.2d 872, 877 (C.A. 5, 1970), *Iroquois Industries, Inc. v. Syracuse China Corporation*, 417 F.2d 963 (C.A. 2, 1969), cert. denied 399 U.S. 909, 90 S.Ct. 2199, 26 L.Ed. 2nd 561 (1970); *Greenstein v. Paul*, 400 F.2d 580, 581 (C.A. 2, 1968). In *Herpich v. Wallace*, 430 F.2d 792, 808 (C.A. 5, 1970) it was said:

> ". . . a plaintiff must frame his complaint so that it appears with reasonable clarity therefrom either that a purchase or sale of securities by the plaintiff is the subject of the fraudulent scheme or that the inducement of such a purchase or sale is a purpose of the scheme. That the conduct complained of may be reprehensible does not require the conclusion that a federal remedy must be furnished. . . . If Congress had intended that the federal courts

> inquire into every decision affecting the management of corporations and then fashion a new federal law on the fiduciary responsibilities of corporate directors, officers, and controlling persons, presumably so revolutionary a federal intervention into an area traditionally handled by the states would have been clearly expressed. . . ."

In trend through interpretation it has been held that the purchaser-seller requirement does not demand a sale in the strict common law traditional sense and as a result it was held in *Ruckle v. Roto American Corporation*, 339 F.2d 24 (C.A. 2, 1964) a company caused by its control group to issue treasury shares at prices arbitrarily established was a seller within the rule, (See *Schoenbaum v. Firstbrook*, 405 F.2d 215, 219 (C.A. 2, 1968) (en banc), cert. denied sub nom. *Marley v. Schoenbaum*, 395 U.S. 406, 89 S.Ct. 1747, 23 L.Ed. 219 (1969)); it was held in *A. T. Brod & Co. v. Perlow*, 375 F.2d 393 (C.A. 2, 1967) that a stockbroker whose customer ordered stock, but refused to pay for it if its market price had not increased by the payment date, was and had standing as a purchaser, it was held in *Dasho v. Susquehanna Corporation*, 380 F.2d 262 (C.A. 7), cert. denied sub nom. *Bard v. Dasho*, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed. 2d 470 (1967) that when Susquehanna Corporation agreed to merge the American Gypsum Company into it by issuing shares to Gypsum's stockholders pursuant to a prescribed exchange ratio, Susquehanna's exchange of its shares for Gypsum's assets in order to merge the two companies was a sale of securities, and Susquehanna had standing to assert a violation of the rule, the "forced sale" rationale being applied to a tender-offer situation in *Crane Company v. Westinghouse Air Brake Company*, 419 F.2d 787 (C.A. 2, 1969), a merger situation, in *Vine v. Beneficial Finance*

Company, 374 F.2d 627 (C.A. 2) cert. denied, 389 U.S. 970 88 S.Ct., 463, 19 L.Ed. 2d 460 (1967) and in a liquidation case, *Coffee v. Permaian Corporation*, 434 F.2d 383 (1970). The aforesaid rationale and broad interpretation by the Courts has now stretched the intended coverage by the Securities Acts and rules completely out of line with the intention of Congress, and Defendants-Petitioners respectfully request Writ of Certiorari to review the current status of Security Act cases and clarify the coverages afforded thereunder. It is further pointed out that under Rule 9(b) of the Federal Rules of Civil Procedure that a claim of fraud and the circumstances in connection therewith shall be stated with particularity. (See footnotes 2 and 6 of Decision.)

CONCLUSION

Defendants-Petitioners JAMES M. McDANIEL and ERNESTINE H. McDANIEL respectfully request Writ Of Certiorari to the United States Court of Appeals For The Fifth Circuit and for reversal of the judgment and opinion of July 9, 1971, wherein it was held that the Plaintiff-Respondent (IITC) had standing as a seller to sue under Section 10(b) of the Securities Exchange Act and Rule 10b-5, reversing and remanding the judgment and opinion of the District Court sustaining a Motion To Dismiss for failing to set forth a claim in the Plaintiff-Respondent Complaint under the Securities Acts or an independent ground of Federal Court jurisdiction.

Respectfully submitted,

FRANK B. HESTER

RICHARD M. HESTER

HESTER & HESTER
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Atlanta, Georgia 30303
404-525-7616
Counsel for Defendants-Petitioners

CERTIFICATE

This is to certify that the Appendix A contained herein is a true and correct copy of the entire Appendix on file in this Court.

This _____ day of , 1971.

Clerk, United States Court of
Appeals for the Fifth Circuit

By: _____

APPENDIX A

No. 30,641

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

GEORGE E. DUDLEY, Receiver for Insurance Investors Trust Company, - Plaintiff-Appellant,

v.

SOUTHEASTERN FACTOR & FINANCE CORPORATION, Et Al., - Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
AT ATLANTA.

APPENDIX FOR PLAINTIFF-APPELLANT.

STUART A. HANDMAKER,
JOHN E. BOYCE,
713 Marion E. Taylor Building,
Louisville, Kentucky,
Attorneys for Plaintiff-Appellant.

HANDMAKER, WEBER, and MEYER
GRIZZARD, JONES, PARKER, and SIMONS.
Of Counsel

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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DOCKET ENTRIES.

1969

11/10 Complaint for injunction, with Exhibits A, B, C, D & E attached, & ORDER to show cause on Nov. 24, 1969 at 3:00 P.M., filed. Summons issued on complaint & order & delivered to U. S. Marshal. Bond to follow.

11/24 HEARING HAD: Two (2) affidavits of Geo. E. Dudley filed. The Court stated it would deny application for temporary restraining order & directed counsel for ptlf to reapply later & Court would reconsider.

12/ 4 ANSWER of deft. ATLANTIC SERVICES, INC., including FIRST CROSS-CLAIM against defts., SOUTHEASTERN AND ALL OTHER NAMED DEFTS. WITH EXCEPTION OF ABRAHAM PARDES, AARON BLOOM & MERLE MOSKOVITZ—filed.

12/ 8 ANSWER of deft. NELL KIMBALL, filed.

1970

1/16 ANSWER of deft. JAMES E. BRYAN, filed. Duplicate requested. To NE.

1/30 Motion to dismiss in behalf of defts. OLEN, SCHEUERMAN, & CROWN SERVICES CORP., with brief filed. To NE.

2/ 2 ANSWER Of deft. A. D. MALKIN, filed. To NE.

2/12 MOTION to dismiss in behalf of defts. ERNESTINE H. McDANIEL & JAMES M. McDANIEL with brief, filed.

2/12 ANSWER of deft. JAMES M. McDANIEL, filed.

2/12 ANSWER of deft. ERNESTINE H. McDANIEL, filed.

Docket Entries

1970

2/16 ANSWER of deft. CARONDELET FINANCIAL CORP., with Exhibits A & B, filed.

2/16 ANSWER of defts. SOUTHEASTERN FACTOR & FINANCE CORPORATION with Exhibits A & B, filed.

2/16 ANSWER of deft. DANIEL P. MATTHEWS with Exhibits A & B, filed.

3/ 2 ANSWERS of deft's. CHARLES I. REYNOLDS & MARGARET W. REYNOLDS with Affidavits of CHARLES I. REYNOLDS & MARGARET W. REYNOLDS, filed.

3/ 5 ANSWER of MERLE MOSKOVITZ, with CROSS-CLAIM Against defts. Southeastern and all other named defts. with exception of Abraham Pardes, Atlantic Services, Inc. & Aaron Bloom—filed.

3/11 ANSWER of deft. Holloway Norris, filed.

3/27 Marshal's returns on service executed as to Atlantic Services, Inc. on 11-17-69; as to Maurice E. Olen, Crown Service Corp. & C. A. Scheuerman on 11-18-69; as to Nell Kimball, James M. McDaniel, Ernestine McDaniel, Charles I. Reynolds, Margaret Reynolds and A. D. Malkin on 11-19-69; as to Carondelet Financial Corp., Southeastern Factor & Finance and Daniel P. Matthews on 11-20-69; as to Hallaway Norris & James E. Bryan on 11-26-69; as to Aaron Bloom on 2-9-70; Merle Moskovitz on 2-18-70; and Bruce W. Skinner on 2-23-70, filed. Marshal unable to locate Abraham Pardes, Leon Slaughter and B. F. Choate.

5/ 4 ANSWER of deft. BRUCE W. SKINNER, filed. To NE. (With Exhibit A & B)

5/13 Affidavit of GEORGE E. DUDLEY, filed. To NE.

Docket Entries

1970	
6/22	ORDER filed on defts.' motions to dismiss, holding the complaint does not state a claim under the Securities Act of 1933 or the Securities Exchange Act of 1934, therefore DISMISSING federal claims for failure to state a claim; also DISMISSING the state claim without prejudice to its being refiled if an independent ground of federal court jurisdiction can be demonstrated; also GRANTING motion by firm of HUIE & HARLAND to be stricken as counsel for deft. Kimball. JUDGMENT filed and entered by clerk, that pltf. taking nothing, that the action be dismissed, and that the defendants, SOUTHEASTERN FACTOR AND FINANCE CORP., et al (as in complaint) recover of the pltf., GEORGE E. DUDLEY, Receiver for INSURANCE INVESTORS TRUST COMPANY, their costs of action, (Copy of order & judgment to counsel & parties (except Slaughter, Weiss, Choate, & Pardes, & Hames) (No address for Hames, rest not served)
7/ 6	Pltf's. motion to reconsider, with memo, filed.
7/22	Plft's NOTICE OF APPEAL, filed. Copy to U.S.C.A. & counsel. To NE.
8/18	$250.00 appeal bond filed.
8/27	Order filed DENYING pltf's motion to reconsider or, alternatively, to grant leave to amend. Copy to counsel & parties (except Slaughter, Weiss, Choate, Pardes, & Hames)

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA
IN ATLANTA, GEORGIA

No. 13241

George E. Dudley, Receiver for
Insurance Investors Trust Company, A Kentucky Corporation, Louisville, Kentucky, Plaintiff,

v.

Southeastern Factor and Finance Corporation, A Georgia Corporation;*
Atlantic Services, Inc., A Delaware Corporation;**
Daniel P. Matthews, 1195 Woodlawn Avenue, Atlanta, Georgia;
Bruce W. Skinner, Atlanta Georgia;
Maurice E. Olen, Highway 90 Drive, Mobile, Alabama;
C. A. Scheuerman, 3108 Boxwood Drive, Montgomery, Alabama;
Nell Kimball, Fitzgerald, Georgia;
Leon Slaughter, Green Island Hills, Georgia;
Hallaway Norris, Zebulon, Georgia;
James E. Bryan, 312 Busher Road, Norfolk, Virginia;
David M. Weiss, Riverdale, New York;
James M. McDaniel, 3020 La Vista Court, Decatur, Georgia;
B. F. Choate, Stone Mountain, Georgia;
John Hames, Atlanta, Georgia;
Abrahams Pardes, Englewood, New Jersey;
Aaron Bloom, Englewood, New Jersey;
Merle Moskovitz, Balacynwood, Pennsylvania;
And
Ernestine McDaniel, 3020 La Vista Court, Decatur, Georgia;

(Defendants Continued on following Page)

Caption Continued

Charles I. Reynolds, 5330 High Point, Atlanta, Georgia;

Margaret W. Reynolds, 5330 High Point, Atlanta, Georgia;

A. D. Malkin, Atlanta, Georgia;

Carondelet Financial Corporation, A Georgia Corporation;***

Crown Services Corporation, A Corporation Wtih Offices in Alabama;****

as Individuals and as Representatives of the Class of All Shareholders of Southeastern Factor and Finance Corporation -- Defendants.

---

*SERVE: Daniel P. Matthews
15 Sixteenth Street
Atlanta, Georgia, or
1195 Woodlawn Avenue,
Atlanta, Georgia;
Or serve any officer, representative, or agent of the Corporation.

**SERVE: The Corporation Trust Company
100 West Tenth Street
Wilmington, Deleware;
Or serve any officer, representative, or agent of the Corporation.

***SERVE: Daniel P. Matthews
1195 Woodlawn Avenue
Atlanta, Georgia;
Or serve any officer, representative, or agent of the Corporation.

****SERVE: Maurice E. Olen
Highway 90 Drive
Mobile, Alabama;
Or serve any officer, representative, or agent of the Corporation.

COMPLAINT.

Comes Plaintiff, George E. Dudley, Receiver for Insurance Investors Trust Company, by Counsel, and for his cause of action states:

(1) The Plaintiff, George E. Dudley, is a resident of the State of Kentucky and is Receiver for Insurance Investors Trust Company (hereinafter "IITC"), a Kentucky corporation. The Defendant, Southeastern Factor and Finance Corporation (hereinafter "Southeastern") is a Georgia corporation. The Defendant, Atlantic Services, Inc. (hereinafter "Atlantic") is a Delaware corporation with offices in Englewood, New Jersey. The Defendants, Daniel P. Matthews, Bruce W. Skinner, Nell Kimball, Leon Slaughter, Hallaway Norris, James M. McDaniel, B. F. Choate, John Hames, Mrs. Ernestine McDaniel, A. D. Malkin, Mr. Charles I. Reynolds, Mrs. Margaret W. Reynolds are residents of Georgia. The Defendant, Carondelet Financial Corporation is a Georgia Corporation. The Defendant, Crown Services Corporation is a corporation with offices in Alabama. The Defendants, Maurice E. Olen and C. A. Scheuerman are residents of Alabama. The Defendant, David M. Weiss is a resident of New York. The Defendants, Abraham Pardes and Aaron Bloom are residents of New Jersey. The Defendant, Merle Moskovitz is a resident of New Jersey.

(2) The amount in controversy exceeds $10,000.00.

(3) This Court has further jurisdiction of this action under the provisions of 28 U.S.C. § 1337 (1964); and Securities Exchange Act of 1934, Ch. 404, § 27, 48 Stat. 902, as amended, 15 U.S.C.A. § 78 a a; and Securities Act of 1933, Ch. 38, § 17; 48 Stat. 84, as amended, 15 U.S.C.A. § 77 q.

(4) Acts were done by the Defendants and their agents within this Judicial District in furtherance of the conspir-

acy set out in this complaint, including but not limited to, the holding of meetings, mailing of stock certificates and checks, and the preparation and execution of documents used in the transactions described in this compliant. This Court has venue of this action pursuant to Securities Exchange Act of 1934 Ch. 404, § 27, 48 Stat. 902, as amended, 15 U.S.C.A. § 78 a a; and Securities Act of 1933, Ch. 38, § 22, 48 Stat. 86, as amended, 15 U.S.C.A. § 77 v.

(5) Plaintiff is the duly qualified and acting Receiver for all the assets and property of, belonging to, or in the possession of IITC, having been duly appointed as Receiver by an Order finding violations of the Investment Company Act of 1940, as amended, entered on September 26, 1967, in the U. S. District Court for the Western District of Kentucky, on September 26, 1967, in that certain cause styled Securities & Exchange Commission v. Insurance Investors Trust Company, et al, Civil Action No. 5753. An attested copy of said Order is attached hereto as Exhibit "A". By further Orders entered in said District Court on October 19, 1967 and September 18, 1969, the said Receiver has been authorized to assert and enforce all claims and other rights which IITC may have against all persons whomsoever.

(6) At all relevant times to this action the Defendant, Daniel P. Matthews, was President of Southeastern, a member and chairman of its Board of Directors, a major shareholder thereof, and a controlling person of said corporation.

(7) At all relevant times to this action the Defendant, Bruce W. Skinner, was Secretary-Treasurer of Southeastern, a member of its Board of Directors, and a controlling person of said corporation.

(8) At all relevant times to this action the Defendant, Maurice E. Olen, was Vice-President of Southeastern, a

member of its Board of Directors, and a controlling person of said corporation.

(9) At all relevant times to this action the Defendant, C. A. Scheuerman, was a Vice President of Southeastern, a member of its Board of Directors, and a controlling person of said corporation.

(10) At all relevant times to this action the Defendant, Nell Kimball, was a member of the Board of Directors of Southeastern, and a controlling person of said corporation.

(11) At all relevant times to this action the Defendant, Leon Slaughter, was a member of the Board of Directors of Southeastern, and a controlling person of said corporation.

(12) At all relevant times to this action the Defendant, Hallaway Norris, was a member of the Board of Directors of Southeastern, and a controlling person of said corporation.

(13) At all relevant times to this action the Defendant, James E. Bryan, was a member of the Board of Directors of Southeastern, and a controlling person of said corporation.

(14) At all relevant times to this action the Defendant, David M. Weiss, was a member of the Board of Directors of Southeastern, and a controlling person of said corporation.

(15) At all relevant times to this action the Defendant, James M. McDaniel, was a member of the Board of Directors of Southeastern, a major shareholder, and a controlling person of said corporation.

(16) At all relevant times to this action the Defendant, B. F. Choate, was a member of the Board of Directors of Southeastern, and a controlling person of said corporation.

Complaint

(17) At all relevant times to this action the Defendant, John Hames, was a member of the Board of Directors of Southeastern, a major shareholder, and a controlling person of said corporation.

(18) At all relevant times to this action the Defendant, Mrs. James M. McDaniel, was a major shareholder of Southeastern, and a controlling person of said corporation.

(19) At all relevant times to this action the Defendant, A. D. Malkin, was a major shareholder of Southeastern, and a controlling person of said corporation.

(20) At all relevant times to this action the Defendant, Charles I. Reynolds, was a major shareholder of Southeastern, and a controlling person of said corporation.

(21) At all relevant times to this action the Defendant, Margaret W. Reynolds, was a major shareholder of Southeastern, and a controlling person of said corporation.

(22) At all relevant times to this action the Defendant, Carondelet Financial Corporation, was a major shareholder of Southeastern, and a controlling person of said corporation.

(23) At all relevant times to this action the Defendant, Crown Services Corporation, was a major shareholder of Southeastern, and a controlling person of said corporation.

(24) At all relevant times to this action the Defendant, Abraham Pardes, was Secretary-Treasurer of Atlantic, a member of its Board of Directors, and a controlling person of said corporation.

(25) At all relevant times to this action the Defendant, Aaron Bloom, was President of Atlantic, a member of its Board of Directors, and a controlling person of the said corporation.

(26) At all relevant times to this action the Defendant, Merle Moskovitz, was Vice-President of Atlantic, a mem-

ber of its Board of Directors, and a controlling person of said corporation.

(27) In connection with the agreement and the performance thereof between Defendant Southeastern and Defendant Atlantic, by which Southeastern sold and delivered stock and an option to purchase stock to Atlantic and Atlantic agreed to issue 34,000 shares of its convertible preferred stock to Southeastern and its shareholders, as hereinafter more fully set forth; the Defendants, Southeastern, Atlantic, Daniel P. Matthews, Bruce W. Skinner, Maurice E. Olen, C. A. Scheuerman, Nell Kimball, Leon Slaughter, Hallaway Norris, James E. Bryan, David M. Weiss, James M. McDaniel, B. F. Choate, John Hames, Abraham Pardes, Aaron Bloom, and Merel Moskovitz by use of means or instrumentalities of interstate commerce, or of the mails, conspired to employ devices, schemes, or artifices to defraud IITC and its stockholders; and to engage in acts, practices, or courses of business which operated as a fraud or deceit upon IITC and its shareholders.

(28) On or about July 29, 1966, IITC and Southeastern entered into a written contract, pursuant to which IITC conveyed and Southeastern received 620,996 shares of the common capital stock of Acme, Inc. owned by IITC at that time; and further pursuant to said contract Southeastern issued 167,624 shares of the preferred stock of Southeastern to IITC, a copy of the said contract being attached hereto as Exhibit "B".

(29) On or about August 26, 1966, IITC transferred to First American Life Insurance Company of Alabama, an Alabama corporation (hereinafter "First American"), 39,466 shares of the stock of Southeastern received in such exchange. After the exchange, the stock was transferred on the books of Southeastern and the certificate for the 167,624 shares of Southeastern stock was surrendered by

IITC and two new certificates were issued and delivered: Certificate Number 125 for 128,158 shares to IITC; and Certificate Number 124 for 39,466 shares to First American. Copies of said stock certificates are attached hereto as Exhibits "C" and "D", respectively.

(30) Plaintiff, the Receiver, has reason to believe that in accordance with the provisions of Paragraph VIII of the contract between IITC and Southeastern annexed hereto as Exhibit "B", IITC has rights of ownership in shares of stock of Southeastern in addition to that represented by said Certificate Number 125, although, as of this date he has been unable to locate and gain possession of the certificate(s) for the additional shares of Southeastern stock.

(31) At some time between June 1, 1967, and August 31, 1967, Defendant, Atlantic and Defendant, Southeastern, entered into an agreement as evidenced by a letter agreement, a copy of which is attached hereto as Exhibit "E". Pursuant to the terms of the said agreement, Defendant Southeastern sold its shares of the preferred stock of First American and an option to purchase additional shares of the preferred stock of First American to Atlantic in return for which Atlantic agreed to issue to Southeastern 34,000 shares of convertible preferred stock of Atlantic.

(32) The exchange between Atlantic and Southeastern was pursuant to a plan of liquidation adopted by Southeastern, whereby all creditors and shareholders were to receive assets of Southeastern.

(33) At all times from and after June 1, 1967, Atlantic knew, or should have known of, the existence of the issued and outstanding preferred stock of Southeastern held and owned by IITC and First American.

(34) Defendant, Atlantic, distributed all of the shares of its convertible preferred stock issued pursuant to its obligations under the agreement described in Paragraph (31) above directly to the creditors and common share-

holders of Southeastern, ignoring the preferred stock position of HTC and First American.

(35) In the alternative, if for any reason the preferred stock issued to HTC by Southeastern should be invalid, then Southeastern is now indebted to HTC and has been so indebted since July 29, 1966, in the sum of $335,248.00 together with interest from that date until paid, the said sum being the par value of the preferred shares issued to HTC; and in such event, the distribution of shares of Atlantic to common shareholders of Southeastern was in fraud of this creditor.

(36) HTC haes received no Atlantic stock nor has it received any money or other assets in any liquidation of Southeastern.

(37) The members of the Defendant class of Southeastern shareholders have been unjustly enriched by the receipt of Atlantic stock.

(38) The class of shareholders of Southeastern named as Defendants herein is so numerous that joinder of all members is impracticable. There are more than 500 members of said class.

(39) There are common questions of law or fact common to all members of said class.

(40) The defenses which may be raised by the individual Defendants named as representatives of the class are typical of the defenses which may be raised by all the members of the said class.

(41) The individual Defendants named as representatives of the class will fairly and adequately protect the interests of said class.

(42) While the Atlantic stock which was wrongfully withheld from HTC remains in the possession of the Southeastern shareholders it is possible for said shareholders to dispose of said stock. Plaintiff's rights are being violated.

and will continue to be violated by the Defendants, and/or their agents, and other persons in active concert with the Defendants, unless the Defendants, and/or their agents, are immediately restrained and enjoined by this Court; and, further, the Plaintiff states that he will suffer immediate and irreparable injury, loss, and damages before notice can be served and a hearing had thereon and will suffer immediate and irreparable injury, loss, and damage, and also continuing irreparable injury, loss, and damage, for which there is not and cannot be an adequate remedy at law unless the Defendant, Atlantic, and/or its agents, are immediately restrained and enjoined from any further transfer on its corporate records of the ownership of any of its corporate stock distributed to shareholders of Southeastern pursuant to the agreement between Southeastern and Atlantic described in Paragraph (31) above; and the Defendant Class of Southeastern shareholders, and/or their agents are immediately restrained and enjoined from any further transfers, sales, or other disposition of any Atlantic stock.

(43) The Injunction sought in this action has not been refused by this Court or any other Court, nor by any United States District Judge or by any other Judge, and no application for this or any other Injunction has heretofore been made to or claimed by any other Court or by any other Judge.

Wherefore, Plaintiff demands as follows:

1. Judgment in favor of Plaintiff against the Defendants, jointly and severally, in the amount of $750,000.00 together with interest at the rate of six percent per annum from October 31, 1967, until paid.

2. That a Restraining Order be granted by this Court and issued by the Judge of this Court, restraining the Defendants, Atlantic Services, Inc., and/or its agents, and the Defendant Class of Southeastern Factor and Finance

Corporation shareholders, and/or their agents, as set forth in a temporary restraining order, a copy of which is attached hereto as Exhibit "F".

3. That the Court grant and issue a Restraining Order and a Temporary Injunction against the Defendant, Atlantic Services, Inc., and/or its agents, enjoining the said Defendant, and/or its agents, from any further transfer on its corporate records of the ownership of any of its corporate stock distributed to shareholders of Southeastern pursuant to the agreement between Southeastern and Atlantic described in Paragraph (31) of the Complaint; and against the Defendant class of Southeastern Factor and Finance Corporation shareholders, and/or their agents enjoining them from any further transfers, sales, or other disposition of any Atlantic stock, and that the Court grant and issue a permanent injunction so enjoining the said Defendants.

4. For his costs herein expended.

5. And for all other and prior relief to which the Plaintiff may be entitled.

Handmaker, Weber & Meyer,
By (s) Stuart A. Handmaker,
(s) John E. Boyce,
713 Marion E. Taylor Building,
Louisville, Kentucky 40202
Attorneys for Plaintiff.

(s) Charles D. Read, Jr.,
1000 Standard Building,
95 Fairlie Street, N. W.,
Atlanta, Georgia 30303
Attorney for Plaintiff.

Complaint

EXHIBIT "A"

In the

DISTRICT COURT OF THE UNITED STATES

Western District of Kentucky

Civil Action File No. 5753

Securities and Exchange Commission, - - Plaintiff,

v.

Insurance Investors Trust Company, a Corporation,
United Brokerage Company, a Corporation, and
Rick Wolfinbarger, - - - - - Defendants.

PRELIMINARY INJUNCTION—Filed September 26, 1967.

This cause coming on to be heard on the return of a rule to show cause why a preliminary injunction should not be entered and a receiver appointed for the assets of defendant Insurance Investors Trust Company in accordance with the prayer of plaintiff's complaint herein, and the Court having made Findings of Fact and having adopted Conclusions of Law, and now being fully advised in the premises:

It is Therefore Ordered, pending the final determination of this action, as follows:

A. That defendant Insurance Investors Trust Company, its officers, agents, servants, employees, attorneys, and each of them, while it is an investment company or-

ganized or otherwise created under the laws of the United States or of any State and having a Board of Directors, and not registered under Section 8 of the Investment Company Act of 1940, as amended (15 U.S.C. 80a-8), be restrained and enjoined from, directly or indirectly:

(1) offering for sale, selling or delivering after sale, by use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such securities is defendant Insurance Investors Trust Company or another person; or from offering for sale, selling or delivering after sale any such security or interest, having reason to believe that such security or interest will be made the subject of a public offering by the use of mails or any means or instrumentality of interstate commerce;

(2) purchasing, redeeming, retiring or otherwise acquiring or attempting to acquire, by use of the mails or any means or instrumentality of interstate commerce, any security or any interest in any security, whether the issuer of such security is defendant Insurance Investors Trust Company or another person;

(3) engaging in any business in interstate commerce;

(4) controlling any company which is engaged in any business in interstate commerce.

B. That defendants Rick Wolfinbarger and United Brokerage Company, their officers, agents, servants, employees, attorneys, and each of them, be restrained and enjoined from, directly or indirectly, causing the defendant Insurance Investors Trust Company to do and perform the acts and practices set forth in paragraph A above, or from,

directly or indirectly, aiding or abetting the defendant Insurance Investors Trust Company in such acts and practices.

C. That, pending further order of this Court, Hon. George E. Dudley be and hereby is appointed receiver of all assets and property of, belonging to, or in the possession of, defendant Insurance Investors Trust Company, and the said receiver is ordered to enter into bond in the sum of $15,000.00, with surety to be approved by the Court, and is hereby authorized, empowered, and directed to collect and take charge of any and all such assets and property and to hold the same subject to the further order of this Court.

Enter:

(s) James F. Gordon
United States District Judge

Dated at Louisville, Kentucky
this 26th day of Sept., 1967, 2:38 p.m.

EXHIBIT "B"

EXCHANGE AGREEMENT.

This Agreement is made and entered into this 29th day of July, 1966, between Insurance Investors Trust Company, a Kentucky Corporation, (hereinafter referred to as IITC); and Southeastern Factor and Finance Corporation, a Georgia Corporation, (hereinafter referred to as SEFAF).

Whereas it is the desire of the parties hereto to exchange certain stock on the terms and conditions herein provided, and in consideration of such exchange, and in consideration of the mutual agreements of the parties hereto, it is agreed as follows:

I. Exchange.

SEFAF does hereby transfer, assign, and deliver to IITC one hundred sixty seven thousand six hundred twenty four (167,624) shares of its six per cent (6%), cumulative, non-voting, preferred stock.

IITC does hereby transfer, assign, and deliver to SEFAF six hundred twenty thousand nine hundred ninety six (620,996) shares of the common capital stock of Acme, Inc., a Tennessee Corporation.

IITC does further hereby transfer and assign to SEFAF, without recourse, a certain note dated June 30, 1966, in the amount of $207,000.00 of Investors Security Corporation, maker, payable to IITC. Said note is transferred to SEFAF without any warranty whatsoever as to the collectability thereof.

II. The Offer to Other Shareholders of Acme Inc.

SEFAF shall, within thirty (30) days after date hereof, transmit in writing to each and every shareholder of Acme, Inc. (other than IITC), a valid offer, by SEFAF to exchange at a specified time within fifteen (15) days following the transmission of such offer, one validly issued, fully paid and nonassessable share of SEFAF 6% cumulative, non-voting, preferred stock for each eight (8) full shares of Acme, Inc. common stock owned by such Acme Inc. shareholder. Said offer shall be in compliance with all applicable law.

III. Representations and Warranties of SEFAF.

SEFAF represents and warrants as follows:

A. SEFAF is a corporation duly organized and validly existing under the laws of the State of Georgia and is the owner and holder of all of the preferred stock it is transferring to IITC hereunder.

B. The balance sheets and statement of net income of SEFAF dated April 30, 1966, attached hereto and made part hereof and signed by Daniel P. Matthews for identification, are true and correct.

C. SEFAF's authorized capital stock of all classes, and the shares issued are as follows:

(1) Ten Million (10,000,000) shares of common capital stock of a par value of twenty cents (20¢) per share of which 2,919,241 shares are issued and presently outstanding.

(2) Five Million (5,000,000) shares of 6% cumulative, non-voting preferred, having a par value of two dollars ($2.00) per share, of which 108,619 shares (excluding those shares exchanged hereby) are presently outstanding.

D. The stock exchanged by SEFAF hereby is validly issued, fully paid and nonassessable, and is free and clear of any and all liens or encumbrances whatsoever.

E. SEFAF has no outstanding options, warrants or rights entitling any person, firm or corporation to purchase any shares of the stock thereof, and has outstanding no obligations which are convertible into shares of stock of SEFAF.

F. There are no material actions at law or in equity, or proceedings by or before any governmental agency, pending; or to the knowledge of the signers hereof, threatened against SEFAF or any of its subsidaries, involving the possibility or any judgment or liability, not covered by insurance, except a counterclaim set forth in a foreclosure action filed by SEFAF in the case of SEFAF v. Tall Man Enterprises, Inc., etc. in Fulton County, Georgia Superior Court. This counterclaim is in the amount of $500,000.00, but coun-

sel for SEFAF has given SEFAF an opinion that this counterclaim has nuisance value only.

G. Neither SEFAF nor any of its subsidiaries is a party to, nor in any manner obligated under, any management contract or contracts providing for special bonus and profit sharing arrangements, or any other unusual or burdensome contracts.

H. SEFAF and its subsidiaries have filed all required tax returns and have paid all applicable federal, state and local taxes, other than taxes not yet due.

I. Since April 30, 1966, there has been no adverse change in the condition, financial or otherwise, of SEFAF and since said date, the net worth of SEFAF has not decreased below that shown on the attached balance sheets.

IV. Representations and Warranties of IITC.

IITC represents and warrants as follows:

A. Acme, Inc. is a corporation duly organized and validly existing under the laws of the State of Tennessee.

B. The Acme, Inc. stock transfered hereby to SEFAF hereby, is free and clear of any and all liens and encumbrances and constitutes validly issued, fully paid and non-assessable shares of the capital stock of Acme, Inc.

C. The only authorized capital stock of Acme, Inc. is 1,600,000 shares of Common Capital stock, having a par value of $1.00 per share, of which 934,081 are presently issued and outstanding.

D. There are no actions at law or equity now pending against Acme, Inc. known to the signer hereof although certain actions have been threatened.

E. Acme, Inc. is not a party to nor in any manner obligated under any management contract or contract providing for special bonus and profit sharing arrangements, or any other unusual or burdensome contract except its guaranty and cross guaranty and finance agreements with

James Talcott, Inc., and purchase agreements relating to the $400,000.00 debenture of The Gibralter Company held by State Capital Life Insurance Company, and the purchase agreements relating to the $200,000.00 debenture of The Gibralter Company held by First Electronics Fund, and documents pertaining thereto, and except stock purchase agreement held by George Stanley of Chattanooga, Tennessee.

F. Acme, Inc. has no outstanding options, warrants or rights entitling any person, firm or Corporation to purchase any shares of the stock thereof, and has outstanding no obligations convertible into shares of stock of Acme.

G. Acme owns 972,999 validly issued, fully paid and nonassessable shares of stock of Investors Security Corporation, of an outstanding of 1,845,421 shares or less. There are no outstanding options, warrants or rights of Investors Security Corporation, for more than 50,000 shares of stock, if any.

The foregoing warranties of Acme, Inc. do not apply to any of its subsidiaries or related companies.

V. Conditions Relating to the Acceptance of Acme, Inc. Stock.

SEFAF acknowledged and agrees that it has had an opportunity to make investigation with reference to Acme, Inc. and the stock of Acme, Inc., transferred to SEFAF hereunder is being transferred without any representation or warranty except as specifically set forth herein. By way of reference, but not limitation, SEFAF acknowledges that it is accepting the Acme, Inc. stock with the understanding of and subject to the following conditions:

A. That a note and debenture agreement in the amount of $400,000.00 held by State Capital Life Insurance Company, being an obligation of the Gibraltar Company, a subsidiary of Investors Security Corporation, the repurchase

of which was guaranteed by Acme, Inc., is in default, and State Capital Life Insurance Company has demanded payment and enforcement thereof. Acme, Inc. is in default of its repurchase agreement.

B. That a note and debenture agreement in the amount of $200,000.00 held by First Electronics Fund, being an obligation of the Gibraltar Company, a subsidiary of Investors Security Corporation, the repurchase of which was guaranteed by Acme, Inc., is in default, and First Electronics Fund has demanded payment and enforcement thereof. Acme, Inc. is in default of its repurchase agreement.

C. That Acme, Inc., Investors Security Corporation and all subsidiary corporations are in default in their various financing agreements and cross guaranties with James Talcott, Inc., and that James Talcott, Inc. is in the process of foreclosing its various security rights and other rights against all loan company collateral, and against Acme, Inc. and its subsidiaries, and that James Talcott, Inc. is collecting on its collateral and is not advancing further funds.

D. That Acme, Inc., Investors Security Corporation, Gibraltar Corporation and all subsidiaries have against them various other claims, defaults and liabilities.

VI. Option to Repurchase

Investors Security Corporation owns 470,230 shares of the Common Capital stock of IITC. Acme, Inc., Investors Security Corporation and SEFAF do hereby grant to IITC an option for a period of two (2) years from date hereof to exchange all or any part of the preferred stock obtained hereby for the aforesaid stock of IITC owned by Investors Security Corporation which is now free of lien on which may hereafter be free of lien. Said exchange shall be made in multiples of 1,000 shares at any time within said two years period, on the basis of the ratio of 167,624 shares

of SEFAF preferred stock for 470,230 shares of the aforesaid IITC stock. Said stock of IITC simultaneously with the execution hereof, shall contain a legend thereon setting forth said option. Such exchange, if the option is exercised, shall be only for investment by IITC in accordance with the investment notation on the stock.

For a period of two years from date hereof said 470,230 shares of IITC stock shall be registered as to voting rights in the name or names of individuals selected by the Board of Directors of IITC, who shall have the sole right to vote said stock in accordance with their discretion. After said two years period, if IITC does not exercise the option to exchange SEFAF preferred stock for IITC common stock, the right to vote the IITC stock as to such stock not reacquired in the exchange shall terminate. Said IITC stock shall also contain a legend setting forth the aforesaid rights pertaining to the voting of said stock.

The aforesaid 470,230 shares of IITC stock which is now free of lien or which may hereafter be free of existing lien shall be placed in escrow with a state or Federally chartered bank in Nashville, Tennessee as escrow agent, in order to assure the effective transfer of said stock to IITC in the event it exercises its aforesaid exchange option and to prevent sale thereof. Until said escrow is established, said stock shall be interimly held in escrow in a joint safety vault by Hiram Snowden and Daniel P. Matthews. If IITC exercises its exchange option, the IITC stock transferred to it shall be free and clear of all encumbrances, and the preferred stock of SEFAF transferred in exchange, shall also be free and clear of all encumbrances.

After ninety days from date hereof, in the event SEFAF receives a bona fide offer to buy or exchange any or all of the shares of IITC stock referred to herein, it shall communicate said offer to IITC, which shall then have an option to either accept the sale or exchange offered to SEFAF, or

IITC may exchange SEFAF preferred stock at the same ratio as acquired for the IITC stock without availing itself of the sale or exchange offered to SEFAF. If IITC does not do either within fifteen (15) days from receipt of notice as to the offer made to SEFAF of purchase or exchange of IITC stock, then SEFAF may make the sale or exchange, provided SEFAF may do so lawfully and provided said sale is bona fide and not intended by SEFAF to adversely affect the condition or position of IITC. Under any circumstances, the voting rights of said IITC stock in the persons designated by IITC shall continue for the two year period.

VII. Miscellaneous Conditions

Investors Security Corporation owes the Central Bank of Lexington, Kentucky, $210,000.00, which is collaterally secured by 60,000 shares of First American Life Insurance Company of Alabama stock owned by IITC. Upon execution hereof, SEFAF shall place an additional 93,000 shares of its preferred stock in escrow with a state or Federally chartered bank in Nashville, Tennessee, with interim escrow with Hiram Snowden and Daniel P. Matthews as above stated, under the following purposes:

> IITC shall offer to substitute said 93,000 shares of SEFAF preferred stock to the Central Bank in release of the aforesaid 60,000 shares of First American Life Insurance Company of Alabama stock. If Central Bank consents to said substitution of said collateral, the 60,000 shares of said First American Life Insurance Company of Alabama so released shall belong absolutely to IITC. If Central Bank does not consent to said substitution of collateral, then as either SEFAF or Investors Security Corporation or any subsidiary of them pays Central Bank, SEFAF will be entitled to the return of such portion of its aforesaid 93,000 shares

of preferred stock placed in escrow, on the basis of 93 shares of SEFAF preferred stock for each 60 shares of First American Life Insurance Company of Alabama released to IITC by Central Bank. If the aforesaid loan to Central Bank is not paid, and the First American Life Insurance Company of Alabama stock, pledged by IITC, is applied on the debt, or if IITC pays all or any part of the debt, IITC shall be entitled to SEFAF preferred stock out of the aforesaid escrow account in an amount equal to 93 shares of SEFAF preferred stock for each 60 shares of First American Life Insurance Company of Alabama stock applied on to the debt, 93 shares of SEFAF preferred stock for each $210.00 paid by IITC on said debt.

If SEFAF, Investors Security Corporation, or any of their subsidiaries pays the Central Bank loan, then SEFAF shall be entitled to the release of SEFAF preferred stock in the 93,000 share escrow at the rate of 93 shares of SEFAF for every $210.00 paid.

SEFAF shall make the necessary stock transfers to effectuate the foregoing provisions of this section.

VIII. Notices

All notices or communications referred to herein as between SEFAF and IITC shall be in writing and sent by registered or certified mail.

IX. Investment Purposes

The stock exchanged hereby, and the aforesaid 466,445 shares of IITC stock held by Investors Security Corporation is being exchanged for investment purposes only and shall be held for investment purposes only. Said stock for a period of at least two years shall not be sold, exchanged, pledged, or otherwise distributed, contrary to these provi-

sions. The certificates for said stock shall contain a legend written thereon to this effect in order to assure the effectuation of the investment purpose of the exchange.

X. Investors' Security Corporation Agreement

Investors Security Corporation, in consideration hereof, joins herein for the purpose only of agreeing to the voting provisions and option provisions granted to IITC or its designees concerning the stock of IITC owned by Investors Security Corporation as referred to herein.

XI. Authority

Parties and signers warrant that the execution of this agreement and the agreement is duly authorized by the corporations for which they are acting.

Dated this 29th day of July, 1966.

SOUTHEASTERN FACTOR AND FINANCE CORP.,

By: (s) Daniel P. Matthews,
President

By: (s) Bruce W. Skinner,
Secretary

INSURANCE INVESTORS TRUST CO.,

By: (s) Rick Wolfinbarger,
President

By: (s) Hiram D. Snowden,
Assistant Secretary

INVESTORS SECURITY CORPORATION,

By: (s) Rick Wolfinbarger,
President

By: (s) (Not Legible),
Secretary

EXHIBIT "A"

SOUTHEASTERN FACTOR AND FINANCE CORPORATION
Atlanta, Georgia
BALANCE SHEET—APRIL 30, 1966

ASSETS

Cash		$ 30,292.46
Receivables:		
Mortgage Loans	$117,535.88	
Loans Receivable	265,320.03	
Accounts Receivable Financing	454,721.32	
	$837,577.23	
Less: Customer Reserve Accounts and Deferred Interest Included in Balance.	211,910.54	
	$625,666.69	
Less: Provision for Doubtful Accounts...	253,231.59	372,435.10
Houses Held for Resale		158,112.75
Investment in Land—23 acres South Carolina		23,000.00
Investment in Properties:		
Home Office Building—16th St., Atlanta, Ga.	$200,200.00	
Apartment House, Atlanta, Ga.	77,500.00	
Apartments, Orangeburg, South Carolina.	55,000.00	
	$332,700.00	
Less: Provision for Depreciation	5,083.75	327,616.25
Investment Stock Other Companies:		
Sonic Lite Corporation	$ 77,644.88	
Security Standard Corporation	75,143.75	
Century Development Fund, Inc.	1.00	
Peachtree Income Properties, Inc.	411.60	
Murrey Charge, Inc.	9,000.00	162,201.23
Other Assets:		
Furniture & Fixtures (Net of Depr.)	$ 5,806.94	
Deferred Rent	2,291.63	
Earnest Money Deposits	1,650.00	9,748.57
Total Assets		$1,083,406.36

Prepared from books without audit

(s) Danield P. Matthews

EXHIBIT "A"

SOUTHEASTERN FACTOR AND FINANCE CORPORATION
Atlanta, Georgia

BALANCE SHEET—APRIL 30, 1966

LIABILITIES AND STOCKHOLDERS EQUITY

Rediscount Loans Payable (Secured by a major portion of the company's assets)		$201,510.16	
Accounts Payable		4,392.69	
Accrued Interest		4,339.42	
Payroll Taxes Payable		273.50	
Debenture Payable (Due 7-15-68)		5,000.00	
Mortgages Payable:			
On Houses	$ 82,453.13		
On Office Building	143,200.00		
On Apartments	71,766.38	297,419.51	
Total Liabilities			$ 512,935.28
Stockholders Equity:			
Preferred Stock—6% Cumulative; 2.00 par; authorized 5,000,000 shares issued and outstanding 49,163 shares		$ 98,326.00	
Common Stock—20¢ par; authorized 10,000,000 shares; issued and outstanding 2,919,241 shares		583,848.20	
Paid In Surplus—Exhibit "B"		181,962.04	
Earned Deficit—Exhibit "B"		(291,234.66)	
		$572,901.58	
Less: 6,417 shares Treasury Stock (at cost)		2,430.50	
Total Stockholders Equity			570,471.08
Total Liabilities and Stockholders Equity			$1,083,406.36

Prepared from books without audit

EXHIBIT "B"

SOUTHEASTERN FACTOR AND FINANCE CORPORATION
Atlanta, Georgia

SURPLUS STATEMENTS
For the Eight Months Ended April 30, 1966

Paid In Surplus:		
Balance—August 31, 1965		$192,689.44
Deductions:		
Loss on Sale Treasury Stock	$4,889.00	
Stock Dividend of Subsidiary Corp. Peachtree Income Properties, Inc. 116,768 Shares @ 5¢	5,838.40	
Total Deductions		10,727.40
Balance—April 30, 1966		$181,962.04
Earned Deficit:		
Balance—August 31, 1965		($314,381.47)
Deductions:		
Net Income for eight months ended April 30, 1966—Exhibit "C"		23,146.81
Balance—April 30, 1965		($291,234.66)

Prepared from books without audit

EXHIBIT "C"

SOUTHEASTERN FACTOR AND FINANCE CORPORATION
Atlanta, Georgia
STATEMENT OF NET INCOME
For the Eight Months Ended April 30, 1966

Operating Revenue:		
Interest Income	$24,892.62	
Earned Fees	489.55	
Profit on sale of Foreclosures	305.56	
Sale of Mineral Rights	6,250.00	
Bad Debts recovery and other income	8,226.02	
Gain on disposition of mortgages	62,181.75	
Operating Revenue		$102,345.50
Deduct Cost of Borrowing:		
Interest Expense		39,561.29
Gross Margin on Operating Revenue		$ 62,784.21
Expenses:		
Salaries	$14,102.21	
Rent	(illegible)	
Office Expenses	(illegible)	
Postage	551.22	
Telephone	2,571.53	
Taxes and Licenses	714.46	
Insurance	441.62	
Travel and auto expenses	2,643.25	
Equipment Rental	1,351.36	
Interest	3,957.03	
Legal expense	8,350.37	
Audit	960.00	
Collection Expense	311.81	
Depreciation	600.00	
Other expense	330.07	40,114.02
Operating Profit		$22,670.19
Rental Operations:		
Rental Income	$ 4,182.87	
Rental Expense:		
Interest	$2,002.03	
Depreciation	1,000.00	
Other Expenses	704.22	3,706.25 476.62
Net Income for Period		$ 23,146.81

Prepared from books without audit

Complaint

EXHIBIT "C"

NUMBER 125

SHARES 128,158

SOUTHEASTERN FACTOR AND FINANCE CORPORATION

6% PREFERRED STOCK $10,000,000

This Certifies That Insurance Investors Trust Co. *is the owner of*

One Hundred Twenty-eight Thousand, One Hundred Fifty-eight (128,158) *Shares of* PAR VALUE $2.00 *each of the*

6% Cumulative Preferred Stock of

Southeastern Factor and Finance Corporation callable at $2.10

Transferrable only on the books of the Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof the said Corporation has caused this Certificate to be signed by its duly authorized officers and to be sealed with the seal of the Corporation.

this 26 day of August AD 19 66

SECRETARY

PRESIDENT

SHARES 2 PAR VALUE $2 EACH

©GOES TO

NOTICE

The shares represented by this certificate have not been registered under the Securities Act of 1933. These shares have been acquired for investment and not with a view to distribution or resale and may not be mortgaged, pledged, hypothecated, assigned, or otherwise transferred, without an effective registration statement for such shares under the Securties Act of 1933, or an opinion of counsel for the corporation that registration is not required under such act.

CERTIFICATE FOR 128,158 SHARES OF THE PREFERRED STOCK OF

Southeastern Factor and Finance Corporation

ISSUED TO

Insurance Investors Trust Company

DATED

August 26, 1966

For Value Received, ____ hereby sell, assign and transfer unto _____

_____ Shares of the Preferred Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint _____ to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.

Dated _____ 19__

In presence of

_____ _____

EXHIBIT "D"

NUMBER 124

SHARES 39,466

SOUTHEASTERN FACTOR AND FINANCE CORPORATION

6% PREFERRED STOCK $10,000,000

This Certifies That First American Life Insurance Co. is the owner of

Thirty-nine Thousand, Four hundred Sixty-Six Shares of PAR VALUE $2.00 each of the

6% Cumulative Preferred Stock of

Southeastern Factor and Finance Corporation callable at $2.10

Transferrable only on the books of the Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof the said Corporation has caused this Certificate to be signed by its duly authorized officers and to be sealed with the seal of the Corporation.

this 26 day of August A.D. 19 66

Bruce W. Skinner
SECRETARY

[illegible]
PRESIDENT

SHARES PAR VALUE $2 EACH

EXHIBIT "E"

ATLANTIC SERVICES, INC.
465 South Dean Street
Englewood, N. J.

June 13, 1967

Mr. Daniel Matthews
c/o Southeastern Factor and Finance Corporation
15 Sixteenth Street, N. E.
Atlanta, Georgia 30309

Dear Mr. Matthews:

Reference is made to our telephone conversations as well as to our meetings of Friday and Saturday, June 9 and 10, 1967, relating, in general, to the acquisition by Atlantic Services, Inc. ("Atlantic") of an aggregate of 63,336 shares of Preferred Stock (voting) of First American Life Insurance Company ("First") as well as an option to purchase an additional 296,664 shares of such Preferred Stock of First, the purchase of such shares and option to be made by Atlantic from Southeastern Factor and Finance Corportation ("Southeastern"). The purchase of such shares of Preferred Stock and the exercise of such option are hereinafter referred to collectively as the "Purchase".

It is contemplated that Atlantic would effect such Purchase in the following manner: Atlantic would (i) pay, cause to be paid, or assume $25,000 principal amount of indebtedness of Southeastern to Mercantile Financial Corporation, with Merchantile's acceptance of Atlantic as a substitute in the event of assumption and their full release to Southeastern, (ii) issue $325,000 principal amount of $10 Cumulative Convertible Preferred Stock to Southeastern, and (iii) issue an aggregate of 175,000 shares of Common Stock of Atlantic to Southeastern.

Southeastern would agree that, pursuant to Section 337 of the Internal Revenue Code of 1954 and Rule 133 promulgated under the Securities Act of 1933, as amended, the shares of Preferred Stock are to be distributed immediately to the stockholders of Southeastern. In such connection, Southeastern would advise Atlantic of the names of persons who, upon receipt of such shares of Preferred Stock, would not be encompassed by the provisions of Rule 133 as such Rule is presently interpreted by the Securities and Exchange Commission. Such would be necessary in order that Atlantic might appropriately reflect the restrictions attendant upon the further disposition of such shares in the records of Atlantic.

With respect to the 175,000 shares of Common Stock of Atlantic and the option to purchase 296,664 shares of Preferred of First, Atlantic and Southeastern each agrees to escrow, with a mutually acceptable escrow agent, such shares of Atlantic Common and the option to purchase Preferred shares of First until such time as the Commissioner of Insurance of the State of Alabama consents to the issuance by Atlantic of sufficient shares of Atlantic Preferred to First to permit the exercise of the option, or until Atlantic chooses to exercise the option by any other means. In no event would Southeastern cause any of such 175,000 shares of Common Stock of Atlantic to be distributed generally to the stockholders of Southeastern prior to the expiration of ten months from the date of issuance thereof. Should Atlantic have failed to exercise the option by any means at the expiration of ten months, the escrow agreement shall terminate and Atlantic may demand either the aforesaid 175,000 shares of Atlantic Common or the option to purchase 296,664 shares of Preferred of First, and the remaining asset after delivery to Atlantic shall be delivered to Southeastern by the escrow agent without restriction.

Finally, the applicable purchase agreement would contain adequate representations and warranties on the part of Southeastern with respect to the validity, status, and present exercisability of the option hereinabove referred to.

Simultaneously with the closing of the transaction contemplated hereby, Southeastern agrees to cause to be held a Special Meeting of the Board of Directors of First. At such meeting of the Board of Directors of First, Southeastern agrees to cause (i) each of the existing directors of First to resign such position, and (ii) designees of Atlantic to be elected as the new members of the Board of Directors of First. Also, Southeastern will cause appropriate waivers of notice to be executed by each of the resigned members of the Board of Directors of First; or, in the alternative, to supply Atlantic with a certified copy of a notice complying with the laws of the State of Alabama relating to the calling of such Special Meeting of the Board of Directors of First.

If the foregoing generally accords with your understanding, kindly execute the duplicate original hereof, whereupon this will memorialize our respective intentions and permit drafting of the applicable agreement.

Very truly yours,

Atlantic Services, Inc.
By (s) Aaron Bloom

Confirmed and Agreed:
Southeastern Factor and Finance Corporation

By _____

AFFIDAVIT.

Affiant, George E. Dudley, a resident of Louisville, Jefferson County, Kentucky, after being duly sworn states:

1. That to his best information and belief each and every allegation contained in the Complaint filed herein is true.

(s) George E. Dudley
George E. Dudley, Receiver for Insurance
Investors Trust Company

Subscribed and sworn to before me by George E. Dudley this 24 day of November, 1969.

My Commission expires: July 29, 1973.

(s) Stuart A. Handmaker,
Notary Public, Jefferson Co. Kentucky

AFFIDAVIT.

Affiant, George E. Dudley, a resident of Louisville, Jefferson County, Kentucky, after being duly sworn states:

1. That this Affidavit is intended for use in the above captioned action.

2. That he is duly appointed, qualified, and acting Receiver of Insurance Investors Trust Company, a Kentucky corporation.

3. That corporate records in his possession and the investigation he has made, along with the Special Audit ordered to be made and filed on February 13, 1969, with the United States District Court for the Western District of Kentucky in Louisville, Kentucky, the Court having jurisdiction over the said corporation, show that Insurance Investors Trust Company has from on or about July 29,

1966, owned preferred stock of Southeastern Factor and Finance Corporation.

4. That the investigation he has made indicates that Southeastern Factor and Finance Corporation adopted a plan of liquidation and that pursuant to an agreement between Atlantic Services, Inc., and Southeastern Factor and Finance Corporation, preferred stock of Atlantic Services, Inc., was distributed as a liquidating asset to certain shareholders of Southeastern Factor and Finance Corporation.

5. That Insurance Investors Trust Company received no stock of Atlantic Services, Inc., or any other asset in any such liquidation all to its irreparable damage.

6. That Corporate Officers of Southeastern Factor and Finance Corporation have indicated they consider the rights of Insurance Investors Trust Company incident to its preferred shareholding in Southeastern Factor and Finance Corporation to have been subordinated. Therefore, Insurance Investors Trust Company was not allowed to participate in the distribution.

7. That he believes that the major liquidation asset of Southeastern Factor and Finance Corporation was the Atlantic Services, Inc. stock obtained pursuant to the said agreement between Atlantic Services, Inc., and Southeastern Factor and Finance Corporation.

8. That he believes Southeastern Factor and Finance Corporation has no remaining asset of any value to distribute in liquidation.

9. That he has rights to the ownership and possession of Atlantic Services, Inc. preferred stock now in the hands of Southeastern Factor and Finance Corporation shareholders.

10. That unless the Southeastern Factor and Finance Corporation shareholders are restrained, they may transfer

or otherwise dispose of the Atlantic Services, Inc. stock in their possession, all to his irreparable damage.

(s) George E. Dudley,
George E. Dudley, Receiver for Insurance Investors Trust Company.

Subscribed and sworn to before me by George E. Dudley this 24 day of November, 1969.

My Commission expires: July 29, 1973.

(s) Stuart A. Handmaker,
Notary Public, Jefferson Co., Kentucky

RETURN ON SERVICE OF WRIT—Filed March 27, 1970.

UNITED STATES OF AMERICA
Southern District of Alabama

George E. Dudley, Receiver for Insurance Investors Trust Co.

vs.

Southesastern Factor and Finance Corp.

Clerk's No. 13241

U. S. Marshal's No. N. Dist. Ga. 11786

SERVICE COMPLETED

I hereby certify and return that I served the annexed Summons and Order on the therein-named Crown Service Corp. by handing to and leaving a true and correct copy with Maurice E. Olen, Pres., Crown Service Corp., personally at 1610 Govt. St., Mobile, Alabama, in the said District at 10:20 a.m., on the 18th, day of November, 1969.

Return On Service of Writ

SERVICE NOT COMPLETED

Date .....

I hereby certify and return, that on the ..... day of ....., 19...., I received the within .... and that after diligent search, I am unable to find the within named .... within said district.

H. Stanley Fountain,
United States Marshal.

By.....
Deputy.

WFA—Endeavor 11-12-69	$ 1.92
DMJ—Endeavor 11-17-69	1.92
Marshal's fees	6.00
Mileage	1.92
Total	$11.76
Fwd Fee	2.00
	$13.76

RETURN ON SERVICE OF WRIT—Filed March 27, 1970.

UNITED STATES OF AMERICA
Southern District of Alabama

George E. Dudley, Receiver for Insurance Investors Trust Co. — Clerk's No. 13241

vs.

Southesastern Factor and Finance Corp. — U. S. Marshal's No. N. Dist. Ga. 11786

SERVICE COMPLETED

I hereby certify and return that I served the annexed Summons and Order on the therein-named Maurice E. Olen by handing to and leaving a true and correct copy thereof with Maurice E. Olen personally at 1610 Govt. St., Mobile, Ala., in the said District at 10:20 a.m., on the 18th day of November, 1969.

SERVICE NOT COMPLETED

Date .....

I hereby certify and return, that on the ..... day of ....., 19...., I received the within .... and that after diligent search, I am unable to find the within named .... within said district.

H. Stanley Fountain,
United States Marshal.

By (s) D. M. Jones,
Deputy.

Marshal's fees	$6.00
Fwd. Fee	2.00
	$8.00

UNITED STATES DISTRICT COURT

Northern District of Georgia
Atlanta Division

Civil Action File No. 13241

George E. Dudley, Receiver for Insurance Investors Trust Company, - - - - - Plaintiff,

v.

Southeastern Factor and Finance Corporation, Et Al., - - - - Defendants.

MOTION TO DISMISS IN BEHALF OF DEFENDANTS OLEN, SCHEUERMAN, AND CROWN SERVICES CORPORATION—Filed January 30, 1970.

Comes now Maurice E. Olen; C. A. Scheuerman and Crown Services Corporation, and moves the Court, individually, and jointly, as follows:

1.

They move to dismiss the action because the Complaint fails to state a claim against them upon which relief can be granted.

2.

They move to dismiss the action and to quash the return of service of summons on the grounds that this is an action upon which there is no jurisdiction granted by virtue of the action being under any federal law or under the Constitution of the United States. Therefore, the service on each of these defendants having been perfected in Alabama, same is not sufficient to confer jurisdiction over them on the grounds of diversity of citizenship.

Motion to Dismiss in Behalf of Defendants, Etc.

3.

They move to dismiss the action on the ground that it is in the wrong district because the only jurisdiction over these defendants would be on the ground of diversity of citizenship and amount in controversy within the meaning of the provisions of 28 U.S.C. §1337 and the defendants have not been served and cannot be served within the jurisdiction of the United States District Court of the Northern District of Georgia or any other Georgia court.

4

They move to dismiss the action on the ground that same fails to state a claim for relief under the Securities Act of 1933 or the Securities Exchange Act of 1934 and, in addition, because there is joined in the action a claim based on common law grounds of misfeasance, malfeasance and/or fraud and, therefore, this Court has no jurisdiction over these defendants in a case where service is perfected outside of the State of Georgia as is true in this case.

5.

They move to dismiss the action because the Complaint fails to show on its face that same is brought within the period of limitations of actions for claims under the statutes referred to in the Complaint.

(s) Martin H. Rubin, of counsel,
Kaler, Karesh, Rubin & Frankel,
Attorneys for Defendants, Olen, Scheuerman and Crown Services Corporation.

1820 Fulton National Bank Building
Atlanta, Georgia 30303

Motion to Dismiss in Behalf of Defendants, Etc.

CERTIFICATE OF SERVICE.

I hereby certify that I have served a copy of the within and foregoing motion upon the attorney for the plaintiff by mailing a copy of same to Charles D. Read, Jr., 1000 Standard Building, 95 Fairlie Street, N. W., Atlanta, Georgia 30303, in an envelope with adequate postage thereon and by United States Mail.

This 30 day of January, 1970.

(s) Martin H. Rubin

MOTION TO DISMISS IN BEHALF OF DEFENDANTS ERNESTINE H. McDANIEL AND JAMES M. McDANIEL—Filed February 12, 1970.

Now Comes Ernestine H. McDaniel and James M. McDaniel, and move the Court, individually, and jointly, as follows:

1.

They move to dismiss the action because the Complaint fails to state a claim against them upon which relief can be granted.

2.

They move to dismiss the action on the ground that it is in the wrong district because the only jurisdiction over these defendants would be on the ground of diversity of citizenship and amount in controversy within the meaning of the provisions of 28 USC Section 1337.

3.

They move to dismiss the action on the ground that same fails to state a claim for relief under the Securities Act of 1933 or the Securities Exchange Act of 1934 and, in addition, because there is joined in the action a claim based on common law grounds of misfeasance, malfeasance, fraud and unjust enrichment.

4.

They move to dismiss the action because the Complaint fails to show on its face that same is brought within the period of limitations of actions for claims under the statutes referred to in the Complaint and the forum.

Hester & Hester,
By: (s) Frank B. Hester,
Attorney for Movants.

Hester & Hester,
803 Fulton Federal Bldg.,
Atlanta, Georgia 30303
(404) 525-7616

AFFIDAVIT—Filed May 13, 1970.

Affiant, George E. Dudley, a resident of Louisville, Jefferson County, Kentucky, after being duly sworn states:

1. That this Affidavit is intended for use in the above captioned action.

2. That he is the duly appointed, qualified, and acting receiver of Insurance Investors Trust Company (hereinafter "IITC"), a Kentucky corporation.

3. That corporate records in his possession, including, but not limited to the minutes of the meetings of the Board of Directors of IITC and copies of correspondence, the investigation he has made, the depositions he has taken during the course of litigation pending in United States District Court for the Western District of Kentucky, styled Securities and Exchange Commission v. Insurance Investors Trust Company, et al., Civil Action No. 5753 and the depositions he or his attorneys have attended which have been taken in the course of litigation pending in United States District Court for the Western District of Kentucky, styled Fischer v. Wolfinbarger, et al., Civil Ac-

tion No. 5911, as consolidated with Garner v. Withrow, et al., Civil Action No. 5919, indicate:

(a) That means of interstate commerce were used in accomplishing the scheme to defraud IITC in connection with the sale of Southeastern Factor and Finance Corporation (hereinafter "SEFAF"), stock in 1966; that interstate telephone lines, the mails and/or means of interstate commercial passenger carriers were used in the negotiation and the completion of the transaction; that either the offer to sell SEFAF stock to IITC and the sale of SEFAF stock to IITC or both, took place within the Northern District of Georgia; that acts necessary to accomplish the said scheme occurred within the Northern District of Georgia.

The Affiant has discovered ample documentation substantiating these conclusions. Such documentation includes, but is not limited to the following:

(i) On December 10, 1968, Affiant, by counsel, took the deposition of Daniel P. Mathews pursuant to a subpoena duces tecum issued in Securities and Exchange Commission v. Insurance Investors Trust Company, et al., Civil Action No. 5753, supra. In response to the question:

> "What papers and records have you brought in response to that subpoena?"

Mr. Mathews replied in part at page 10 of the deposition:

> "So what I have brought with me is this, the major file that I was able to lay my hands on embodying the gist of a transaction between Southeastern and Insurance Investors Trust Company during 1966. That transaction being the acquisition of a block of stock in a holding company, Acme, Incorporated, and a note of Investors Security Corporation; secondly, a copy of

a letter which embodies the one agreement, and I don't know if this is actually a transaction, but the one agreement that was ever discussed or entered into between Southeastern and the United Brokerage Corporation, [the alter ego of Rick Wolfinbarger and the managing agent of IITC.]"

(ii) Mr. Mathews at pages 26 and 27 in referring to the records he had brought pursuant to the subpoena duces tecum said:

"Here is a file on a transaction that Southeastern had with Insurance Investors Trust Company, and I might explain something here that I suppose is going to be a problem to us as we proceed. I am sure you are aware already that there is some extensive litigation filed regarding various loan companies which were owned by a holding company, that was shares of which were acquired by Southeastern from Insurance Investors Trust Company. There is a real problem in keeping track of records on these companies. We have had records under subpoena twice, I believe. We have toted records back and forth up into the hills of Tennessee and over to Nashville and back to Atlanta and so forth. I have spent a solid week looking for what I am sure is the most pertinent document in here. If you have a copy of it I would appreciate it if we could use your copy because I cannot locate mine. I know it is in the records, that being the exchange agreement that was executed on July 29th between Insurance Investors Trust Company and Southeastern. I have in this file a copy which was sent to me by Hiram Snowden as Vice President of Insurance Investors Trust Company of the form being filed by Insurance Investors Trust Company immediately after

that transaction, which describes in essence what was embodied in the exchange agreement, but I do not have a copy of that exchange agreement with me. I likewise have in that file a letter directed from me as President and Chairman of Southeastern to Mr. Wolfinbarger, President of Acme, Inc., the Investors Security Corporation, Gibraltar Company, dated August 10, 1966. Do you want me to comment on the contents of these?"

(iii) At page 66 of the same deposition in response to a question asking whether the certificate of SEFAF stock acquired by IITC had been delivered. Mr. Mathews said:

"Oh, yes, sir, they were delivered at the time our transaction was closed on the 29th of July."

(iv) At page 114 of the deposition Mr. Mathews said:

". . . there was constant correspondence from them down to us, cover letters to boxes of records that were being sent down. Incidentally, I have a room full of records and literally, I mean a room full of records, regarding Investors Security Corporation, the subsidiary loan companies, Acme, Incorporated, and so forth that were shipped down."

(v) Exhibit "E" to the Mathews deposition is a copy of a letter from Mr. Mathews' records produced pursuant to the subpoena duces tecum and it is attached hereto as Exhibit "A" to this Affidavit. It is addressed to United Brokerage Company, the alter ego of Rick Wolfinbarger and managing agent of IITC, signed by Daniel Mathews, accepted by Rick Wolfinbarger, and refers to the sale of Acme, Inc., to SEFAF.

(b) That misrepresentations were made to HTC in the offer and sale of SEFAF stock to HTC.

(c) That the Defendants, James M. McDaniel, Ernestine McDaniel, Maurice E. Olen, C. A. Scheuerman, and Crown Services Corporation participated in the acts and misrepresentations above mentioned and were in a control relationship to those who participated in the said acts and misrepresentations.

Affiant has discovered ample documentation substantiating these conclusions. Such documentation includes, but is not limited to:

(i) During the course of the above mentioned Mathews deposition, Mr. Mathews in response to the question:

> "I would like the officers from let's say September, 1965, through the present?"

replied in part at page 13:

> ". . . the fall of the year 1966. And at approximately that same time Mr. C. A. Scheuerman . . . was made a Vice President of the corporation [SEFAF]."

(ii) In that same deposition Mr. Mathews in response to the question:

> "Who are the directors of Southeastern now?"

responded in part at pages 13 and 14:

> ". . . Mr. Olen, Mr. Scheuerman, . . ."

(iii) Discussing those who received SEFAF stock as finder's fee for "finding" business opportunities the following dialogue took place at page 97 of the Mathews deposition:

Affidavit

"Q. What did Mr. Olen's Company, Crown Services, find?

A. Well, by and large the finder's fee that Crown Services derived were on the acquisition of the loan companies from Insurance Investors Trust Company. There were constantly situations being brought to our attention by Crown Services, which I understand their primary business is in business brokerage and finding and so forth."

Continuing on pages 98 and 99:

"Q. How many shares did Crown Services get for finding Acme?

A. Approximately 350,000, as I recall.

Q. At what, do you recall these shares?

A. At the time, at about $0.16 or $0.17 a share. That would have worked out—understand, these finder's fees were, of course, paid simultaneous with the closing of the transaction and at the time we were under the impression that the asset which we were acquiring had realizable hard net worth well in excess of $1,000,000.

Q. Did you make any demand for the return of these shares when you made a demand for recision by Insurance Investors Trust Company?

A. Well, we made demand but the position there is a difficult one because, in fact, we did not rescind the transaction.

Q. Who did you make demand upon?

A. Mr. Olen.

Q. And what was—did you demand this by letter?

A. No.

Q. Just Orally?

A. (Nodding affirmatively).

Q. And what was his oral response?

A. Exactly what I just gave you. It came down to a question of whether or not we were going to actually rescind the transaction and we did not.

Q. So not having rescinded the transaction, you then took no action to recover these shares?

A. That's right."

(iv) Page 67 of the Mathews deposition establishes that Mrs. McDaniel owned a substantial block of the preferred shares of SEFAF stock.

(v) At page 3 of the deposition of Mr. James M. McDaniel taken by Affiant, by counsel, on December 10, 1968, pursuant to a subpoena duces tecum issued in Securities Exchange Commission v. IITC, et al., Civil Action No. 5753, supra, Mr. McDaniel testified that he had been a director of SEFAF from early 1966 through July or August of 1967.

(vi) At page 5 of the said McDaniel's deposition it is established that Mr. McDaniel and/or his wife own a substantial block of SEFAF stock.

(vii) The minutes of the IITC Board of Directors meeting held July 26, 1966, note that the written proposal of SEFAF to buy Acme, Inc., stock was reviewed and that the negotiations for this offer should be conducted with Maurice Olen and SEFAF.

(d) That means of interstate commerce were used in accomplishing the scheme to defraud IITC in connection with the transaction in which SEFAF traded securities to Atlantic Services, Inc., in return for Atlantic Services' preferred stock which stock was then distributed to SEFAF shareholders with the exception of IITC. Interstate telephone lines, the mails and/or [redacted]ans of interstate commercial passenger carriers were used in the negotiation of

the exchange and distribution to SEFAF shareholders other than HTC and in the omission to distribute Atlantic Services' stock to HTC; that acts occurred within the Northern District of Georgia necessary to accomplish the said scheme.

Plaintiff has discovered ample documentation substantiating these conclusions. Such documentation includes, but is not limited to:

(i) During the course of the above mentioned Mathews deposition Mr. Mathews in response to a question asking what was the first contact between himself and Atlantic Services leading to the SEFAF-Atlantic Services transfer said at page 37:

> "As I recall, it came as a result of a telephone conversation I suppose to me from Mr. Ezrine [counsel for Atlantic Services]."

Pursuing this line of questioning the following dialogue is found on pages 38 through 39:

> "Q. Well, let's get back to the telephone call from Mr. Ezrine to you while you were the President of Southeastern. What was the essential nature of that call?
>
> A. Well, the purpose of the call was to discuss whether or not Southeastern would be willing to sell certain shares of stock which Southeastern owned in First American Life and an option to purchase additional shares to Atlantic Services. At which time it was explained to me by Mr. Ezrine—do you want—
>
> Q. Yes, please go on.
>
> A. Well, it was explained to me by Mr. Ezrine that his complex or the complex that was being put together was interested in acquiring an insurance com-

pany which could be run as part of the holding company.

Q. And what was your response to the 'phone call?

A. Well, my response was that we were very very definitely interested in arranging a transaction.

Q. What happened next?

A. I flew to New York. . . ."

(ii) Page 23 of the above mentioned McDaniel deposition establishes that Mr. McDaniel acted, at least in part, as the escrow agent for the transfer of Atlantic Services stock to SEFAF in the Atlantic Services-SEFAF transaction.

(iii) Mr. McDaniel testified at page 24 that he received the escrow agreement from Mr. Ezrine by mail.

(iv) On November 4, 1968, the Affiant took the deposition of Ivan A. Ezrine pursuant to a subpoena issued in Securities and Exchange Commission v. IITC, et al., supra. When asked if Maurice Olen participated in the Atlantic Services-SEFAF transaction, Mr. Ezrine testified at page 16:

> "A. He attended, with Mr. Mathews, one meeting that I recall at that time at the Westbury Hotel in New York. . . ."

Mr. Ezrine testified at page 30 that he felt the reason for Mr. Olen's participation was his substantial shareholdings in SEFAF.

(v) Exhibit "F" to the above mentioned Mathews deposition is a copy of a letter produced by Mr. Mathews in response to the subpoena duces tecum, and is attached hereto as Exhibit "B". The letter is addressed to Mr. James M. McDaniel in Atlanta, Georgia and is signed as accepted by James M. McDaniel. It refers to transmitting a tempo-

rary stock certificate with instructions to Mr. McDaniel in his capacity as escrow agent.

(vi) Attached as Exhibit "C" hereto is a copy of an original of a letter signed by Ivan A. Ezrine addressed to Mr. James M. McDaniel and confirmed and accepted by Mr. James M. McDaniel. It refers to Mr. McDaniel in his capacity as an escrow agent and outlines duties incident thereto.

(e) That James M. McDaniel and Ernestine McDaniel are residents, inhabitants and citizens of, and are domiciled, found, and transact business in Georgia within the federal judicial district for the Northern District of Georgia.

Affiant has discovered ample documentation substantiating these conclusions. Such documentation includes, but is not limited to the testimony of Mr. McDaniel found at page 2 of the above mentioned McDaniel deposition where it is established that Mr. McDaniel's residence is Decatur, Georgia.

(f) That Maurice E. Olen, C. A. Scheuerman, and Crown Services Corporation are found in, and transact business, and have transacted business during all times relevant to this law suit, in Georiga within the federal judicial district for the Northern District of Georgia.

Affiant has discovered ample documentation substantiating these conclusions. Such documentation includes, but is not limited to:

(i) The testimony of Mr. Ivan A. Ezrine in the above mentioned Ezrine deposition at pages 16 and 30, referred to in Paragraph 3(d)(iv) above, establishes that Maurice Olen conducted business activities in behalf of SEFAF, a Georgia corporation with headquarters within the Northern District of Georgia.

(ii) The testimony of Mr. Mathews in the above mentioned Mathews deposition at pages 13 and 14 established

that Mr. Olen and Mr. Scheuerman are or were directors of SEFAF at all times relevant to this law suit.

(iii) The testimony in the above mentioned Mathews deposition at pages 97, 98, and 99, establishes that Maurice Olen and Crown Services Corporation, a corporation controlled by Maurice Olen, have acted extensively in promoting the business of SEFAF; specifically, they were instrumental in finding the Acme, Inc. acquisition.

(s) George E. Dudley, Receiver for Insurance Investors Trust Company.

County of Jefferson }
State of Kentucky } ss

Subscribed and sworn to before me by George E. Dudley this 7 day of May, 1970.

My Commission expires: 2/28/72.

(s) Kenneth S. Handmaker
Notary Public, State at Large, Kentucky

Tendered by:

(s) Stuart A. Handmaker
(s) John E. Boyce
Handmaker, Weber & Meyer
Counsel for Plaintiff,
George E. Dudley
713 Marion E. Taylor Building
Louisville, Kentucky 40202

ORDER—Filed June 22, 1970.

This civil action was brought by George E. Dudley, Receiver for Insurance Investors Trust Company (hereinafter referred to as IITC) to recover damages allegedly sustained by IITC as a result of defendants' wrongfully withholding from IITC (a shareholder of Defendant South-

eastern Factor and Finance Corporation) its proportionate share of a liquidating distribution from Southeastern. Jurisdiction is alleged under the Securities Act of 1933 (15 U.S.C. § 77a, et seq.), 28 U.S.C. § 1337, and 28 U.S.C. § 1332. Defendants Ernestine and James M. McDaniel (hereinafter referred to as Defendants McDaniel) and Defendants Maurice E. Olen, C. A. Scheuerman, and Crown Services Corporation (hereinafter referred to as the Olen defendants) have moved to dismiss on grounds of (1) failure to state a claim, (2) improper venue, (3) failure to state a claim under the Securities Acts and improperly joining with the claim arising under the Securities Acts a claim based on common law grounds of misfeasance, malfeasance, fraud, and unjust enrichment, and (4) failure to show on the face of the complaint that the action was brought within the period of the statute of limitations. In addition, the Olen defendants have moved to dismiss for insufficiency of process and lack of personal jurisdiction.

The complaint alleges that in July 1966 IITC and Southeastern entered into a written contract pursuant to which IITC conveyed to Southeastern approximately 621,000 shares of the common stock of another corporation (Acme, Inc.) in exchange for approximately 168,000 shares of the preferred stock of Southeastern. IITC subsequently transferred some of its Southeastern stock to First American Life Insurance Company of Alabama, which company thereafter was also a preferred shareholder of Southeastern.

During the summer of 1967, Defendant Atlantic Services, Inc., and Defendant Southeastern entered into an agreement pursuant to which Southeastern was to sell to Atlantic certain shares, and options to purchase additional shares, of preferred stock in First American Life Insurance Company of Alabama, and Atlantic was to issue to Southeastern 34,000 shares of Atlantic's convertible preferred stock. This latter transaction allegedly was pursuant to a

plan of liquidation adopted by Southeastern whereby all creditors and shareholders were to receive assets of Southeastern. Defendant Atlantic allegedly distributed the shares which it had agreed to transfer to Southeastern directly to the creditors and common shareholders of Southeastern, pursuant to Southeastern's instructions, but in so doing ignored the preferred position of IITC and First American (of which latter corporation Atlantic was itself a preferred shareholder). IITC now claims that the transaction between Atlantic and Southeastern was intended to, and did, result in a fraud upon certain shareholders of Southeastern in that they were not given their liquidating shares as required by Southeastern's liquidation plan.

The court must agree with defendants that the complaint does not set forth a claim arising under the Securities Acts. Those statutes give rise to causes of action arising out of fraudulent or deceptive acts connected with the sale or purchase of securities. As the Fifth Circuit recognized in Hooper v. Mountain States Securities Corp., 282 F. 2d 195 (5th Cir. 1960), a significant purpose of Section 10(h) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and the regulations authorized therein (SEC Regulation X-10B-5) was to extend to sellers of securities the same protection against fraudulent and other unlawful schemes which the Securities Act of 1933 afforded to those defrauded in the purchase of securities. In the instant case any injury plaintiff received as a result of the acts set forth in the complaint did not result from the sale or purchase of securities, but, rather, resulted from the purchaser corporation's failure properly to distribute among its shareholders certain securities which the corporation itself had purchased.[1] Such actions, however wrongful under state law,

[1]Although plaintiff contends in his brief that the complaint alleges that IITC's 1966 purchase of Southeastern's preferred shares was induced by misrepresentation, this contention is incorrect. The complaint contains no such allegation either directly or indirectly.

are not within the purview of the Securities Act of 1933 or the Securities Exchange Act of 1934.

In view of the foregoing, it is evident that plaintiff's federal claims must be dismissed and that the state claims therefore should also be dismissed unless an independent ground of federal court jurisdiction exists as to those claims. See United Mine Workers v. Gibbs, 383 U. S. 715 (1966). And such jurisdiction must exist, if at all, only by virtue of the diverse citizenship of the parties (28 U.S.C. § 1332). Furthermore, since neither the plaintiff nor all of the defendants reside in this judicial district venue is proper only if the action has been brought in the district where the claim arose. 28 U.S.C. § 1391(a). It is impossible to tell from the complaint in its present posture whether or not diversity jurisdiction is present for there are no allegations as to the place of incorporation and the principal place of business of some of the defendant corporations. (For example, Defendant Crown Services Corporation is merely alleged to be "a corporation with offices in Alabama"). Furthermore, numerous defendants are alleged to be "residents" of certain states without any indication whatever as to what states they are "citizens" of, and it is the state of citizenship—not the state of residency —which determines whether diversity of citizenship exists.

The court has serious doubts as to whether the common law cause of action plaintiff asserts arose in this district, and as to whether this court has personal jurisdiction over all of the defendants, but absent a substantial allegation that the court has subject matter jurisdiction of the common law claim those questions need not, and will not, be determined.

In summary, the court HOLDS that the complaint does not state a claim under the Securities Act of 1933 or the Securities Exchange Act of 1934 and the federal claims

therefore are DISMISSED for failnre to state a claim. Furthermore, since it does not appear from the complaint that an independent ground of federal court jurisdiction exists with regard to the common law claim the state claim is DISMISSED without prejudice to its being refiled if an independent ground of federal court jurisdiction can be demonstrated.

Also before the court is a motion by the law firm of Huie and Harland to be stricken as counsel for Defendant Kimball. It appearing that defendant has been properly notified of this request, and no objection thereto having been presented to the court, this motion is hereby GRANTED.

It Is So Ordered.

This 22nd day of June, 1970.

(s) Newell Edenfield,
United States District Judge.

JUDGMENT—Filed June 22, 1970.

This action came on for consideration before the Court, Honorable Newell Edenfield, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, dismissing federal claims for failure to state a claim, and dismissing state claim without prejudice.

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed, and that the defendants, Southeastern Factor and Finance Corporation, Atlantic Services, Inc., Daniel P. Matthews, Bruce W. Skinner, Maurice E. Olen, C. A. Scheuerman, Nell Kimball, Leon Slaughter, Hallaway Norris, James E. Bryan, David M. Weiss, James M. McDaniel, B. F. Choate, John Hames, Abraham Pardes, Aaron Bloom, Merle Moskovitz, and

Judgment

Ernestine McDaniel, Charles I. Reynolds, Margaret W. Reynolds, A. D. Malkin, Carondelet Financial Corporation, Crown Services Corporation, as Individuals and as Representatives of the Class of All Shareholders of Southeastern Factor and Finance Corporation, recover of the plaintiff, George E. Dudley, Receiver for Insurance Investors Trust Company, their costs of action.

Dated at Atlanta, Georgia, this 22d day of June, 1970.

Claude L. Goza,
Clerk of Court

By: (s) Ruth M. Stilwell,
Deputy Clerk.

Filed and entered in clerk's office
June 22, 1970

Claude L. Goza, Clerk
By: (s) Ruth M. Stilwell,
Deputy Clerk.

NOTICE OF APPEAL—Filed July 22, 1970.

Notice is hereby given that, George E. Dudley, Receiver for Insurance Investors Trust Company, a Kentucky Corporation, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth (5th) Circuit from so much of the Order dismissing federal claims for failure to state a claim at Plaintiff's cost entered in this action on the twenty-second (22nd) day of June, 1970.

Dated July 22, 1970.

Grizzard, Jones, Parker & Simons,
Attorneys for Plaintiff.

By:
(s) Richard L. Parker

10th Floor, Standard Building,
95 Fairlie Street, N.W.,
Atlanta, Georgia 30303,
525-8361.

NOTE: Appellees Olen, Scheuerman, and Crown Services Corporation included in a Designation of Record to be included in this Appendix the Return of Summons and Complaint on Maurice E. Olen, C. A. Scheuerman, and Crown Services Corporation. The Returns on Olen and Crown Services Corporation have been included in this Appendix. The Return on C. A. Scheuerman is not, however, included in the Record Appellant received from Court of Appeals, and, therefore, has been included.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30641

GEORGE E. DUDLEY, Receiver for Insurance Investors Trust Company,
Plaintiff-Appellant,

versus

SOUTHEASTERN FACTOR AND FINANCE CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

(July 9, 1971)

Before WISDOM, Circuit Judge, DAVIS*, Judge, and GOLDBERG, Circuit Judge.

DAVIS, Judge: This is another case staking out a piece of the already crowded field of "sellers" and "purchasers" of securities under § 10(b) of the Securities Exchange Act of 1934 15 U.S.C. § 78j (b) (1964) and its enabling rule, Rule 10 b-5, 17 C.F.R. § 240.10b-5 (1971). We are called upon to determine whether ap-

*Honorable Oscar H. Davis, U.S. Court of Claims, sitting by designation.

pellant George Dudley, acting as representative of Insurance Investors Trust Company (IITC), has such standing on the basis of the assertions in his complaint. He was appointed receiver of IITC (a Kentucky corporation) in 1967 and discovered among its assets a certificate of ownership of shares of the preferred stock of Southeastern Factor and Finance Corporation (SEFAF), incorporated in Georgia. Authorized by the court which appointed him to assert and enforce all of IITC's claims, appellant brought this action in the Northern District of Georgia against SEFAF, certain of its principals, its shareholders as a class, and other corporations, alleging that through a liquidation of SEFAF in which IITC was not allowed to participate, IITC was defrauded of its investment in SEFAF, contrary to § 10(b) and Rule 10b-5 (and also of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q (1964)). The suit sought damages from the wrongdoers, or in the alternative equitable relief to allow IITC to recover the value of stock distributions from the persons to whom they were made since, in IITC's view, those distributions should have gone to it. The District Court dismissed the action on the ground that the complaint did not show that IITC was a "seller" or "purchaser" of securities within the coverage of the statute and the rule, and the appeal is from that judgment.

Since the case is before us on a motion to dismiss, we must, of course, take as true all the factual allegations of the complaint, supplemented by its exhibits. *Coffee v. Permian Corp.*, 434 F.2d 383, 384 (C.A. 5, 1970); *Kahan v. Rosenstiel*, 424 F.2d 161, 164 (C.A. 3),

cert. denied sub nom. Glen Alden Corp. v. Kahan, 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970); *Iroquois Industries, Inc. v. Syracuse China Corp.*, 417 F.2d 963, 965 (C.A. 2, 1969), *cert. denied*, 399 U.S. 909, 90 S.Ct. 2199, 26 L.Ed.2d 561 (1970). These show that in July 1966 IITC transferred to SEFAF 690,996 shares of the stock of Acme, Inc., in return for which SEFAF issued 167,624 shares of its own preferred stock to IITC. Some 39,000 of these SEFAF shares were later disposed of by IITC, leaving it with at least 128,158 shares.[1] In June 1967 SEFAF entered into an agreement with Atlantic Services, Inc. (Atlantic) under which SEFAF conveyed virtually all its assets to Atlantic in return for some 32,500 shares of preferred stock, and some 175,000 common shares, of Atlantic. It is then asserted that these Atlantic shares were distributed, under a plan to liquidate SEFAF, to SEFAF's creditors and to its shareholders, except for IITC which did not receive any distribution. These transactions between SEFAF and Atlantic are said to have occurred without IITC's knowledge or consent, in fraud of its rights, and through use of the mails and instrumentalities of interstate commerce. The result, in appellant's view, was to leave IITC with stock in a corporation which lacks operative existence.[2]

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[1]The complaint states that appellant "has reason to believe that • • • IITC has rights of ownership in shares of stock of Southeastern [SEFAF] in addition to that represented" by the certificate for the 128,158 shares.

[2]Appellant's brief asserts that SEFAF currently "has no assets, no liabilities, no common shareholders, no directors, no officers, and essentially no existence." An affidavit filed by appellant in the court below declares that "he believes [SEFAF] has no remaining asset of any value to distribute in liquidation."

The two texts which frame our answer to the query whether these allegations are enough to invoke federal jurisdiction (under the securities legislation) provide:

Section 10(b) of the Securities Exchange Act of 1934:

> "It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> * * * *
>
> (b) to use or employ, *in connection with the purchase or sale of any security* registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b) (1964) (emphasis added).

Rule 10b-5 of the Securities and Exchange Commission:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) to employ any device, scheme or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (1971) (emphasis added).

The leading case of *Birnbaum v. Newport Steel Corporation*, 193 F.2d 461 (C.A. 2), *cert. denied*, 343 U.S. 956, 72 S.Ct. 1051, 96 L.Ed. 1356 (1952), interpreted the italicized phrase in both statute and rule as limiting permissible plaintiffs in a civil action under the rule to "purchasers" or "sellers" of securities. While this reading may not have been inherent in the literal language, *cf. Mutual Shares Corporation v. Genesco, Inc.*, 384 F.2d 540, 543-44 (C.A. 2, 1967), and despite some academic criticism, *see, e.g.* Leech, Transactions in Corporate Control, 104 U. Pa. L. Rev. 725, 832-35 (1956); Comment, 100 U. Pa. L. Rev. 1251 (1952), and even a judicial prediction of *Birnbaum's* demise, *Entel v. Allen*, 270 F. Supp. 60, 70 (S.D.N.Y. 1970), that holding remains, as Judge Wisdom put it, "[b]loody but un-

bowed" within its circuit. *Rekant v. Desser*, 425 F.2d 872, 877 (C.A. 5, 1970). See *Iroquois Industries, Inc. v. Syracuse China Corporation*, 417 F.2d 963 (C.A. 2, 1969), *cert. denied*, 399 U.S. 909, 90 S.Ct. 2199, 26 L.Ed. 2d 561 (1970); *Greenstein v. Paul*, 400 F.2d 580, 581 (C.A. 2, 1968). In a trilogy of recent cases,[3] this court (through the pen of Judge Ainsworth) thoroughly considered the "purchaser"/"seller" requirement, and adopted the *Birnbaum* rule for this region, saying that "for a plaintiff to establish his standing to maintain a Rule 10b-5 action for damages, he must be a purchaser or seller of the securities involved in connection with the alleged rule violation." *Herpich v. Wallace*, *supra*, 430 F.2d 792, 806 (C.A. 5, 1970).

But it has also been pointed out, many times, that the purchaser-seller requirement does not demand a sale in "the strict common law traditional sense," *Hooper v. Mountain States Securities Corporation*, 282 F.2d 195, 203 (C.A. 5, 1960), *cert. denied*, 365 U.S. 814, 81 S.Ct. 695, 5 L.Ed.2d 693 (1961); *Herpich v. Wallace*, *supra*, 430 F.2d 792, 806 (1970); and *Birnbaum's* progeny have for the most part interpreted those terms very liberally.[4] For example, in *Ruckle v. Roto Ameri-*

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[3] [*Herpich v. Wallace*, 430 F.2d 792 (C.A. 5, 1970)] *Herpich v. Wilder*, 430 F.2d 818 (C.A. 5, 1970); *Shell v. Hensley*, 430 F.2d 819 (C.A. 5, 1970).

[4] The Securities Exchange Act encourages such liberal construction by providing:

> "The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire.
>
> The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of." 15 U.S.C. § 78c(a) (13), (14) (1964).

See Fidelis Corporation v. Litton Industries, Inc., 293 F. Supp. 164, 169-70 (S.D.N.Y. 1968).

can Corporation, 339 F.2d 24 (C.A. 2, 1964), a company caused by its control group to issue treasury shares at prices arbitrarily established was held to be a seller within the rule. *See Schoenbaum v. Firstbrook,* 405 F. 2d 215, 219 (C.A. 2, 1968) (en banc), *cert. denied sub nom. Marley v. Schoenbaum,* 395 U.S. 406, 89 S.Ct. 1747 23 L.Ed. 219 (1969). In *A.T. Brod & Co. v Perlow,* 375 F.2d 393 (C.A. 2, 1967), a stockbroker whose customer ordered stock, but refused to pay for it if its market price had not increased by the payment date, was held to have standing as a purchaser; the court said that "[n]ovel or atypical methods should not provide immunity from the securities laws." 375 F. 2d at 397. In *Dasho v. Susquehanna Corporation,* 380 F.2d 262 (C.A. 7), *cert. denied sub nom. Bard v. Dasho,* 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 470 (1967), Susquehanna Corporation agreed to merge the American Gypsum Company into it by issuing shares to Gypsum's stockholders pursuant to a prescribed exchange ratio. The Seventh Circuit held that Susquehanna's exchange of its shares for Gypsum's assets in order to merge the two companies was a sale of securities, and Susquehanna had standing to assert a violation of the rule. *See also Herpich v. Wallace, supra,* 430 F.2d 792, 809 (C.A. 5, 1970); *Erling v. Powell,* 429 F.2d 795, 798 (C.A 8, 1970); *Crane Company v. Westinghouse Air Brake Company,* 419 F.2d 787, 797-98 (C.A. 2, 1969); *cert. denied,* 400 U.S. 822, 91 S.Ct. 41, 27 L.Ed. 2d 50 (1970); *Mader v. Armel,* 402 F.2d 158, 160-61 (C.A. 6, 1968), *cert. denied sub nom. Young v. Mader,* 394 U.S. 930, 89 S.Ct.1188, 22 L.Ed.2d 459 (1969); *Hooper v. Mountain States Securities Corp., supra,* 282 F.2d 195, 202-03 (C.A. 5, 1960).

Applying this general canon of broad construction is a line of 10b-5 decisions which is particularly close, in facts and rationale, to our case. In *Vine v. Beneficial Finance Company*, 374 F.2d 627 (C.A. 2), cert. denied, 389 U.S. 970, 88 S.Ct. 463, 19 L.Ed.2d 460 (1967), the plaintiff was a shareholder of a corporation, Crown Finance Company, most of whose stock had been acquired by Beneficial Finance Company which, under state law, could effect a so-called short-form merger without the approval of the class of shareholders of which plaintiff was a member. Although the plaintiff had retained his shares in Crown Finance, his only remaining right was either to sell his stock for Beneficial's cash offer or to pursue his appraisal rights, which would also result in a cash payment for his shares. The opinion noted that "[s]ince, in order to realize any value for his stock, appellant must exchange the shares for money from appellee, as a practical matter appellant must eventually become a part to a 'sale,' as that term has always been used." 374 F.2d at 634. In these circumstances the Second Circuit held the plaintiff a forced seller, with standing under the rule. 374 F.2d at 635.

This "forced sale" rationale was applied to a tender-offer situation in *Crane Company v. Westinghouse Air Brake Company, supra*, 419 F.2d 787 (C.A. 2, 1969). Crane proposed a merger with Westinghouse which it sought to accomplish through a tender offer to Westinghouse's shareholders, under which the former acquired substantial amounts of the latter's stock. Westinghouse's management decided, however, that American Standard, Inc. was a more companionable suitor,

and through a series of market manipulations (it was alleged) the Crane proposal was defeated by vote of the stockholders, allowing Westinghouse to be merged into American Standard. Shares of American Standard were then distributed to Westinghouse stockholders, including Crane, which American Standard threatened with a divestiture action under the anti-trust laws unless Crane sold its holdings. Crane began selling its American Standard stock and brought suit. The court held that Crane had standing, at least as a forced seller of the shares it owned at the time of trial, to assert American Standard's violations of Rule 10b-5.

Vine's informing principle, carried forward in *Crane*, is that a shareholder should be treated as a seller when the nature of his investment has been fundamentally changed from an interest in a going enterprise into a right solely to a payment of money for his shares. *See Voege v. American Sumatra Tobacco Corp.*, 241 F. Supp. 369 (D. Del. 1965). That rationale has recently been applied by this court to a liquidation in a case that in our view is indistinguishable from the one before us. In *Coffee v. Permian Corporation, supra*, 434 F.2d 383 (1970), a minority stockholder (Coffee) sued under § 10(b) and Rule 10b-5, alleging that his corporation had been substantially liquidated solely for the benefit of its 80 per cent corporate stockholder (Permian). Coffee's complaint was that, after he had purchased shares in the Knight Company, it issued shares to Permian, making the latter a 50 per cent owner. Permian later gained control of Knight's board of directors and, after achieving 80 per cent ownership, caused Knight to adopt a plan of liquidation under

which its assets would be appropriated solely for Permian's benefit. The District Court dismissed the complaint for the reason that Coffee was not a seller or purchaser. This court reversed, holding that Coffee was a seller and suggesting that he might be a purchaser as well. The opinion found the *Vine* reasoning applicable, and noted that *Vine* turns "on whether the shareholders, * * * have in substance become sellers despite the fact that they still hold stock certificates in a non-functioning corporation," and that "[i]n both instances [*Vine* and *Coffee*] the shareholder 'as a practical matter' has no choice but to surrender his interest in the corporation and to exchange his shares for cash." 434 F.2d at 386. The court explicitly extended the *Vine* principle from a merger to a liquidation. 434 F.2d at 386.

We think that here, too, the asserted liquidation of SEFAF constituted in effect a sale of IITC's shares in it. Appellant charges in substance (and appellees do not yet deny) that the plan of dissolution and liquidation adopted by SEFAF's board of directors had two steps. First, SEFAF's only substantive asset, its stock in First American Life Insurance Company (an Alabama corporation), was to be traded to Atlantic for Atlantic shares which in turn were to be distributed directly to SEFAF's shareholders and creditors as an "initial" liquidating dividend. The second step was to be a "final" liquidating dividend of cash from the proceeds, if any, of certain litigation in which SEFAF is plaintiff. The "initial" liquidating dividend has been distributed to SEFAF's shareholders and creditors, but

IITC did not share in it. Some of the appellees suggest that SEFAF's liquidation is still in process and that IITC will ultimately participate in the "final" dividend from the litigation proceeds. We do not think that this contingency of a possible monetary payment impairs IITC's status as a seller under the statute and the rule. The litigation was filed in 1967 and no proceeds have yet been forthcoming; appellant asserts that the likelihood is that none ever will. See note 2, *supra*. In any event, even assuming that there may ultimately be a "final" dividend of money, the assertion is that SEFAF has already been substantially liquidated and is a non-functioning corporation within the principle of *Vine* and *Coffee;* IITC's investment in a going enterprise has been commuted into a right (said to be a remote and speculative one at that) to a payment of money. We hold therefore, following *Vine* and *Coffee*, that IITC is a seller under § 10(b) and Rule 10b-5. *See also Fidelis Corporation v. Litton Industries, Inc.*, 293 F. Supp. 164, 168-70 (S.D.N.Y. 1968).[5]

We agree, it goes without saying, that merely because conduct is reprehensible does not make it redressable under the federal securities laws. *Hernich v. Wallace*, *supra*, 430 F.2d 792, 808. As in *Coffee*, 434 F.2d at 386, it may be that the fact-finder will eventually determine that IITC was not a "seller", either

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[5]We need not decide whether IITC is likewise a "purchaser" within either § 10(b) of the 1934 Act and Rule 10b-5, or within § 17(a) of the 1933 Act. Nor do we consider appellant's secondary proposition that, since it alternatively seeks equitable relief, it need not for that purpose be a "purchaser" or "seller" to have standing under Rule 10b-5. *See Mutual Shares Corp. v. Genesco, Inc., supra*, 384 F.2d 540, 546-47 (C.A. 2, 1967).

because SEFAF was not substantially liquidated or for some other reason. "However, at this point in the litigation we are confined to evaluating [appellant's] allegations, and they charge that [SEFAF] has been substantially liquidated pursuant to [SEFAF's and Atlantic's] plan. If that is true, then [IITC's] stock has been converted into a claim for cash", and appellant "would have standing as a seller to sue under § 10(b) of the Securities Exchange Act and Rule 10b-5." 434 F.2d at 386. The essence of the case is that appellant has alleged enough to be given an opportunity to prove that the provisions of statute and rule have been infringed.[6] We cannot now say that plaintiff will

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[6]While the complaint would hardly rate an "A" for precise drafting, it does allege (among other things):

> "The exchange between Atlantic and Southeastern was pursuant to a plan of liquidation adopted by Southeastern, whereby all creditors and shareholders were to receive assets of Southeastern.
>
> "At all times from and after June 1, 1967, Atlantic knew or should have known of, the existence of the issued and outstanding preferred stock of Southeastern held and owned by IITC and First American.
>
> "Defendant, Atlantic, distributed all of the shares of its convertible preferred stock issued pursuant to its obligations under the agreement * * * directly to the creditors and common shareholders of Southeastern, ignoring the preferred stock position of IITC and First American.
>
> * * * *
>
> "IITC has received no Atlantic stock nor has it received any money or other assets in any liquidation of Southeastern."

The complaint also declares that, in the exchange between SEFAF and Atlantic, appellees "by use of means or instrumentalities of interstate commerce, or of the mails, conspired to employ devices, schemes, or artifices to defraud IITC and its stockholders; and to engage in acts, practices, or courses of business which operated as a fraud or deceit upon IITC and its shareholders." These assertions, taken together, fairly ap-

be unable to demonstrate any set of facts, in support of his claim, entitling him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957).

The order dismissing the complaint is reversed, and the action is remanded for further proceedings in accordance with this opinion.[7]

REVERSED AND REMANDED

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prise the appellees of the transactions complained of, and satisfy F.R.Civ. Proc. 9(b) which requires particularity in allegations of fraud. *See Nolan Bros., Inc. v. United States*, 266 F.2d 143, 145-46 (C.A. 10, 1959).

[7]After the motion to dismiss was granted, appellant sought leave to amend his complaint to show diversity of citizenship, which leave was denied by the District Court. Appellant appeals also from that denial. Since we hold that he can assert his claims under the Securities Exchange Act, we do not reach the diversity issue.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

Appendix 15b

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 1970

No. 30641

D. C. Docket No. CA 13241

GEORGE E. DUDLEY, Receiver for Insurance Investors Trust Company,
Plaintiff-Appellant,
versus

SOUTHEASTERN FACTOR AND FINANCE CORPORATION, et al,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before WISDOM, Circuit Judge, DAVIS*, Judge, and GOLDBERG, Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same

is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

July 9, 1971

Issued as Mandate:

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*HONORABLE OSCAR H. DAVIS,
U.S. Court of Claims, sitting by designation.

CERTIFICATE OF SERVICE

I do hereby certify that I am a member in good standing of the Bar of The Supreme Court of The United States, and that I have this date served the Plaintiff-Respondent with the within and foregoing Petition For Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit with the entire Appendix filed in the Court below therein by this day mailing copies thereof to Honorable Stuart A. Handmaker and John E. Boyce, Attorneys at Law, c/o Handmaker, Weber and Meyer, 713 Marion E. Taylor Building, Louisville, Kentucky 40202, Attorneys for Plaintiff-Respondent with sufficient postage thereon to insure delivery.

This the 5 day of Aug, 1971.

Frank B. Hester

FRANK B. HESTER, Attorney for
Defendants-Petitioners,
James M. McDaniel and
Ernestine H. McDaniel

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